(24,117)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 966.

JOHN E. ROLLER, PLAINTIFF IN ERROR,

vs.

MARY H. MURRAY, HOLMES CONRAD, TRUSTEE; GEORGE A. WHEELOCK, ET AL.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

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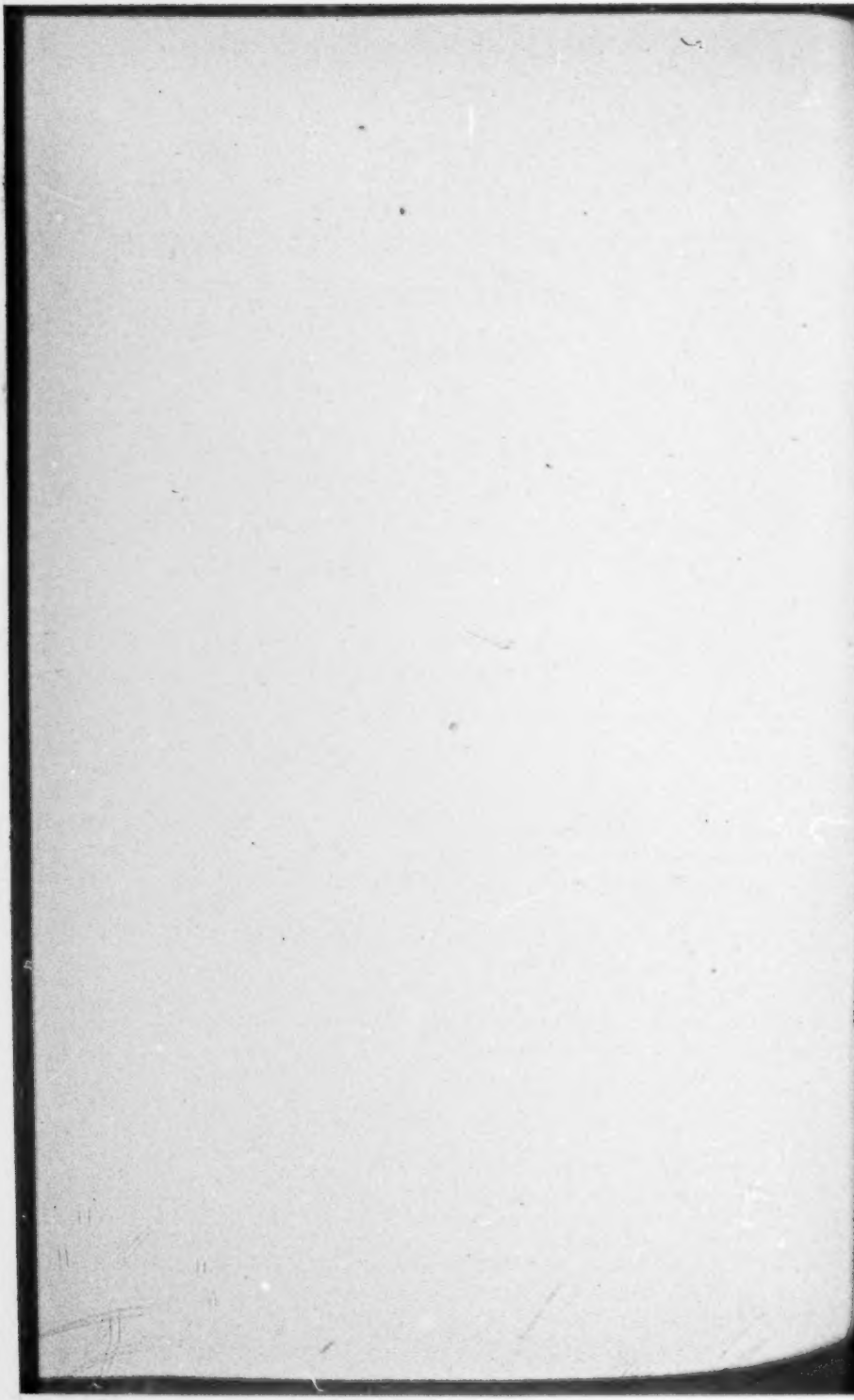

In the Supreme Court of Appeals of West Virginia.

JOHN E. ROLLER, Plaintiff in Error,
vs.
MARY H. MURRAY et als., Defendants in Error.

PETITION AND ASSIGNMENTS OF ERROR.

Upon a Writ of Error to a final decree of the Supreme Court of Appeals of West Virginia, rendered on the 22nd day of October, 1912, upon an appeal theretofore pending in said court of the name and style of John E. Roller, appellant, vs. Mary H. Murray et als., appellees, affirming the decree of the Circuit Court of Pendleton County, West Virginia, rendered on the 26th day of July, 1910, in a suit in Chancery, lately pending in said Circuit Court in the name of John E. Roller, plaintiff, vs. Mary H. Murray et als., defendants.

To the Honorable the Judges of the Supreme Court of the United States:

The Petition and Assignments of Error of John E. Roller, respectfully showeth that the facts shown by the record, so far as they are relevant to this petition, are as follows, to-wit:

Statement of the Case.

In the year 1872, the Petitioner, John E. Roller, was employed by the late Emily Hollingsworth of the City of Philadelphia, as an attorney at law, to recover for her a tract of about 52,000 acres of land, situated in the counties of Rockingham and Augusta in the State of Virginia, and in the county of Pendleton in the State of West Virginia, known as the "Hollingsworth Survey," which had been lost to the true owners thereof, who were non-residents of the State of Virginia, and residents of the City of Philadelphia, State of Pennsylvania, by a tax sale made previous to the late war, and consummated by a tax deed made by the County Clerk of Rockingham County, an official of the Government of the Confederate States, in the year 1863 in the very height of the war between the States.

The said Emily Hollingsworth was not willing on account of the doubts and difficulties attending the recovery of said lands to pay any certain fee, and agreed that the compensation of the Petitioner, Roller, should be contingent upon a recovery, and that the same should be twenty per cent of whatever might be realized out of the proceeds of the lands recovered, after paying out of the same all taxes, in arrears, and all costs and expenses of the litigation connected therewith, it being agreed also on the part of the said Petitioner, Roller, that the said Emily Hollingsworth "should be at no

time required to pay any money for anything connected with the litigation in Virginia," and that

"If these expenses were paid by the said Roller, he was to be reimbursed out of the proceeds of the lands recovered."

In other words the said Emily Hollingsworth agreed to give to the said Petitioner, Roller, one-fifth of the net proceeds of all lands recovered, and the said Roller was to advance and pay all expenses in Virginia, connected with the litigation, but no part of the expenses outside of the State of Virginia,—it being further agreed that the interest of the said Roller in said lands should not be sold unless he agreed to the price.

These matters of agreement are set forth in certain letters, which are embodied in the record of this cause, under the name of the "McMurtrie letters", but these letters must be read in the light of the fact that prior to the correspondence between Richard C. McMurtrie and the Petitioner, Roller, as exhibited in the record, in what is known as the "McMurtrie letters", upon the terms of which letters the decisions of the Virginia and West Virginia Courts have turned, it was "understood and agreed," between the Petitioner, Roller and the said Emily Hollingsworth, acting through her agent, that a compromise could be and was to be made by her with the adverse claimants to 13,800 acres, a part of said original Hollingsworth Survey—it being well known that these claimants knew that their title was worthless—that these adverse claimants were clients of said Petitioner, Roller, prior to that time, and that this compromise was to be made, before he would take the case for Emily Hollingsworth, and before any costs were incurred in the proposed litigation, so that it was understood and agreed in effect that the said tract of 13,800 acres, or the larger part thereof, was to be, and could be made available for the purposes of paying costs and expenses of any litigation that might be had over the remainder of said original survey; and that "the same was more than ample for said purposes"; and that it was in view of this agreement that the Petitioner agreed even to undertake the case, and as shown in the "McMurtrie letters", agreed to advance the expenses of the litigation in Virginia, knowing that there were ample resources available for the payment and discharge thereof, out of property belonging to the said Emily Hollingsworth.

Soon after the agreements aforesaid were made and entered into between the Petitioner, Roller, and the said Emily Hollingsworth the tract of 13,800 acres was compromised with the adverse claimants thereof, and a tract of 8,800 acres of the estimated value at that time of $1.00 per acre, was conceded to the said Emily Hollingsworth, and 5,000 acres was conceded by her to the claimants under the tax title thereof, creating thereby a fund, which was more than ample for the purpose of paying all costs and any expenses whatever of any litigation that might be had over the remainder of the original survey.

Acting under said agreements, the Petitioner Roller undertook the arduous professional labors necessary in the premises, making extensive examination of the title to a large number of tracts of land

in the counties aforesaid, investigating the rights of adverse claimants, locating the interior as well as the exterior lines of the survey, and of the adverse claims thereto, conducting important litigation in the Courts, State and Federal both of Virginia and of West Virginia, with such success that after years of labor, taking in the best part of the life of the Petitioner, every part of the land referred to was recovered except so far as some small portions thereof were lost by compromise and adjusted in that way. So fully was this work done that Emily Hollingsworth sold one or more tracts out of the original survey thus recovered by the work of the petitioner, Roller, and of the 17,014 acres—that part of the original survey lying in the State of W. Virginia—the said Emily Hollingsworth completed and executed her contract with the said petitioner and conveyed to him by deed duly executed and acknowledged his undivided one-fifth interest therein, and delivered the said deed to him.

Subsequently, after the sale and conveyance of some portions of the land by Emily Hollingsworth herself, she conveyed by deed dated about the first day of April, 1889, all of the unsold portion of the survey comprising about 44.000 acres to Mary H. Murray, who was to take the shoes of the said Emily Hollingsworth, and was to carry out the agreements between her and the said Petitioner, Roller. But some time thereafter, to-wit, on the 23rd day of December, 1892, the said Mary H. Murray, in connection with her husband, Henry M. Murray, without the consent, and practically without the knowledge of the Petitioner, Roller—certainly so far as the price and terms of the sale were concerned—sold and conveyed to one George A. Wheelock the entire unsold portion of the Hollingsworth survey, of about 44.000 acres of land, except a small tract of about 100 acres at the Pendleton Spring, at the price of $132,000.00, of which $7,500.00 was paid in cash, and the residue was represented by several deferred payments, the first of which for $7,500.00 matured one year after date, and was paid.

Of this purchase money the said Mary H. Murray sent to the Petitioner, Roller, his one-fifth of the first payment received by her after deducting taxes, costs and commissions, which need not here be recapitulated, although the taxes and certain other costs should not have been deducted, and proceeded thereafter to control absolutely the entire business without paying any regard whatever to the Petitioner or to his claim to an interest in the matter, and subsequently after being given by Roller, in the correspondence with her, copies of the letters or correspondence which had passed between said Roller and Richard C. McMurtrie of Philadelphia, who was acting as attorney for Emily Hollingsworth, shortly after the beginning of the Petitioner Roller's connection with the business, and acting under the advice of new Counsel, the said Mary H. Murray repudiated any liability whatever on her part to the said Roller for any part of the purchase price of said property, and refused to recognize further any claim on his part to an interest in the lands recovered by him, or to any interest in the proceeds of the sale thereof, the evident purpose as it was shown afterwards, being to set up the defence of champerty to Roller's claim and to

succeed in having overturned the whole matter of business into the hands of the new attorney.

That, thereupon, the Petitioner, Roller, instituted his suits, one in the Circuit Court of the County of Pendleton in the State of West Virginia and the other in the Circuit Court of the County of Rockingham in the State of Virginia the former suit preceding the latter by several days, it having been instituted to the first May Rules, 1901, to enforce his claim to one-fifth of the purchase money from the sale of said lands to the said George A. Wheelock, and in the hope that a settlement could be made without litigation, he sent to the said Mary H. Murray a copy of his Bills of Complaint. Thereupon, she replied in an offensive letter of May, 1901, in which she declined to recognize the claim of the Petitioner, and referred him to her new attorney and the end desired by both, was attained.

The Case in the Virginia Courts.

The case in the Virginia Courts, however, was prosecuted to a final decree before the case in West Virginia was matured for trial; and after a final decree was rendered in favor of the defendants in Virginia it was successfully used under the full faith and credit clause of the Constitution of the United States, and the plea of res adjudicata as a defense and the only defense against a debt which the West Virginia Court admitted to be just and legally enforceable in that State but for the Virginia decree.

It will be necessary and logical therefore to first give a complete history of the case in Virginia.

On the 4th of November, 1901, in the case in Virginia, the defendant, Mary H. Murray and her husband, appeared and demurred to the Bill of Complaint upon the ground that the Bill did not aver whether the contract alleged to have been made between the Complainant, Roller, and Emily Hollingsworth, was or was not in writing, and called upon the complainant to amend his Bill in that particular, and the Court being of opinion that "the alleged contracts were not sufficiently stated to enable the defendants to properly traverse the allegations of the bill," remanded the cause to Rules with leave to the Complainant to amend his Bill, if he should so desire, and thereupon the said Petitioner filed his first amended Bill—amended only in the slight particular named—and the said defendants filed a demurrer to this amended bill, in which was set up the defense, "that the contract by its express terms was in violation of public policy, and was such as a Court of Equity would not countenance or enforce."

It will be observed that neither in the original, nor in the first or second amended or supplemental bills of complaint was any reference made to the previous understanding and agreement between the said Emily Hollingsworth and the Petitioner, Roller, in regard to the compromise which was to be made as to the tract of 13,800 acres so as to make that tract, or a large part thereof, available for the payment of the costs or expenses of any litigation which might be had over the remainder of the original survey.

The cause continued on the docket of the Court without further progress being made therein, until the 27th day of April, 1906, when under a decree requiring the cause to be prepared for trial, an amended and supplemental bill of complaint was filed by leave of Court, in which the petitioner, Roller, having in the meantime found among his papers, the formal contract between himself and Emily Hollingsworth, dated the 10th of July 1875,—which on its face was free from any possible objection on the ground of champerty—made the same a part of his said amended and supplemental bill, and, upon this bill of complaint, sought and obtained an injunction order against the Pocahontas Company, an insolvent defendant, who was engaged in denuding the entire survey of all merchantable timber and tanbark, to the great damage of both parties to the controversy, and to this bill, the defendant, Mary H. Murray, on the 19th day of September, 1906, filed her demurrer in which the same defense, that of "champerty", was set up.

The cause was submitted to the Court upon the several bills of complaint and the demurrers thereto, on the 13th day of October, 1906, and was decided by the Court on the 19th day of March, 1907.

In this decision of the Court, the Court held that the common law rule in regard to champertous contracts was still in force in Virginia, and that tested by the principles of the common law, applicable to such cases, the contract represented or set forth in the correspondence between Petitioner Roller, and Richard C. McMurtrie was not enforceable; that the contract of July 10, 1875, was based upon said letters and was also unenforceable, that the demurrers should be sustained, the bills of complaint should be dismissed, and the injunction awarded upon the amended and supplemental bill of complaint dissolved.

The Court had taken over five months in which to consider and decide the case. Within a few days after said decision the Petitioner, Roller, tendered to the Court certain amendments to the amended and supplemental Bill of Complaint in which amendments—inter alia—it was averred that prior to the correspondence between Richard McMurtrie and the Petitioner, Roller, as exhibited in the record, in what is known as the "McMurtrie letters," upon the terms of which letters the decision of the Court had turned, the agreement and understanding between the Petitioner, Roller, and Emily Hollingsworth in regard to a compromise being made by her with the adverse claimants to 13,800 acres, a part of the said original Hollingsworth Survey, already set forth in this petition, had been made and entered into, that it was well known that these claimants knew that their title was worthless—that these adverse claimants were former clients of said Petitioner, Roller, and that this compromise was to be made, before he would take the case for Emily Hollingsworth, and before any costs were incurred in the proposed litigation, so that it was understood and agreed that the said tract of 13,800 acres, or the larger part thereof, was to be, and could be made available for the purpose of paying costs and expenses of any litigation that might be had over the remainder of said original survey; and that the same was more than ample for said purpose; and that it

was only in view of this agreement that the Petitioner Roller had ever agreed to undertake the case, and as shown in the "McMurtrie letters," agreed to advance the expenses of the litigation in Virginia, knowing that there were ample resources available for the payment and discharge thereof, out of property belonging to the said Emily Hollingsworth.

These proposed amendments to the amended and supplemental bill, set forth some other grounds of defence against the allegation that the contract involved in the cause was champertous, but no further reference need be made to them here.

On the 24th of June, 1907, a decree was entered by the Court, in which the cause was brought on to be heard upon the original and amended bills of complaint and on the amended and supplemental bill of complaint, and the demurrers of the defendant, Mary H Murray, to the said Bills, as amended and supplemented,—the decree further reciting that the cause was heard also,

"on the motion of the Complainant for leave to file a further "amended bill, which further amended bill was tendered in writing, "and is lodged with the papers in the cause as a part of the record, "marked 'amended bill' 'tendered and rejected' on the objections of "Mary H. Murray to the filing of said 'last mentioned amended "bill,' which bill was tendered after the argument and after the "Court had delivered its decision."

And then went on to say—

"On consideration whereof leave to file said 'last mentioned amended bill' is denied," and the Court being of opinion

"that the contract between the Complainant and Emily Hollings- "worth described in the plaintiff's pleadings and which is sought to "be enforced in this suit is champertous and against public policy "and not enforceable in a Court of Equity, doth adjudge order and "decree that the demurrer of said Mary H. Murray to the bill as "amended and supplemented be and the same is sustained."

So that it appears from the record that the Court peremptorily rejected the said "last mentioned amended bill," and refused leave to file the same, and denied the Petitioner, Roller, a hearing thereon.

The attention of the Court is again called to the fact that the record shows that Emily Hollingsworth obtained 8,800 acres of the tract of 13,800 acres by the compromise made in accordance with the agreement between Emily Hollingsworth and the petitioner, Roller, set up in said "last mentioned amended bill," and that this land was originally valued at $1.00 per acre by both Emily Hollingsworth and the Petitioner, Roller, and that later on, it was included in the sale to Wheelock at a price three times that amount.

So that the case, which would have been presented to the Court, if said "last mentioned amended bill" had been allowed to be filed, would have been:

(1) That it was agreed and understood between the Petitioner, Roller, and Emily Hollingsworth, before the former would even undertake the case, that a compromise was to be made and could be

made with the former clients of his "before any costs were incurred," as to the 13,800 acre tract and that this compromise was subsequently made.

(2) That it made the said tract of 13,800 or 8,800 acres thereof, available for the purpose of paying costs and expenses of any litigation over the remainder of said original survey.

(3) That the same was more than ample for said purpose.

(4) That under the agreements set forth in the letters of 1873, in the correspondence between the Petitioner, Roller, and Richard C. McMurtrie, all these lands were expressly charged with the repayment of all costs and expenses that might be incurred in the State of Virginia; and that only the net proceeds of said land after the payment of all such costs and expenses had been deducted, were to be divided between the Petitioner, Roller, and the said Emily Hollingsworth, and

(5) That this previous understanding and agreement, if the Petitioner, Roller, had been permitted to prove it, would have removed every possible ground upon which it could be claimed, that the agreement between himself and Emily Hollingsworth was champertous and unenforceable in the Courts.

The record further shows that the Court by this same decree of June 24, 1907, which refused the Petitioner, Roller, permission to file this "last mentioned amended bill" also refused to permit the cause to be retained on the docket to be proceeded in by the Petitioner, Roller, upon the claim that he was entitled to recover upon a quantum meruit and that the contract between himself and Emily Hollingsworth under which he was entitled to one-fifth interest in the purchase money due from George A. Wheelock should be regarded as security for whatever he might have advanced or what his services were really worth, and peremptorily dismissed the entire cause, struck it from the docket of the Court, but in doing so used the following language:

"And the Court doth further adjudge, order and decree that the "bills of complaint be dismissed but without prejudice to his right "to institute other proceedings upon a quantum meruit if he be so "advised."

So that this decree in this cause did not make a finality of the controversy.

Upon an appeal therefrom, this decree of June 24, 1907, was affirmed by the Supreme Court of Appeals of Virginia on November 21, 1907.

"See Roller v. Murray, 107 Va. Reports, p. 527."

The Case in West Virginia.

In the West Virginia Courts, the record shows that:

In May, 1901, the Petitioner, Roller, had instituted in the Circuit Court of Pendleton County his suit in Equity, wherein the Petitioner was plaintiff and Mary H. Murray and Henry M. Murray, her husband, the latter since deceased, George A. Wheelock, Holmes Conrad, Trustee, and the Chesapeake Western Company, a Corpo-

ration, were the defendants. In the bill the Petitioner, Roller, claimed to be entitled to one-fifth of the net proceeds of the purchase price of the same tract of land, about 44,000 acres, referred to in the Virginia suit, which had been sold on the 23rd day of December, 1892, by Mary H. Murray to George A. Wheelock, and contemporaneously with the conveyance to Wheelock the latter had executed a deed of trust to Holmes Conrad, Trustee, to secure the unpaid purchase money bonds, the entire price being $132,000.00, averring also that certain payments had been made to him on account of his interest in said purchase price, as set out in said bill. It is not necessary to go into detail as to the other allegations of said bill. The Chesapeake Western Company answered said bill shortly after the institution of the suit, and thereupon Mary H. Murray filed her answer to said bill, the date of the filing of which does not appear, but presumably, it was subsequent to the date of the affidavit to said answer in November, 1908. Previous thereto, in December, 1907, the Petitioner, Roller, had filed an amended bill in said cause, wherein the Pocahontas Company and the Bowling Green Trust Company were made parties, it appearing that the Chesapeake Western Company had sold the tract of land in controversy to the Pocahontas Company and contemporaneously, that company had conveyed the land to the Bowling-Green Trust Company. When the said amended bill was filed, an injunction was granted according to the prayer thereof, enjoining the Chesapeake Western Company and the Pocahontas Company from cutting any of the timber upon that portion of the said land situated in Pendleton County, West Virginia, comprising about 17,000 acres.

This amended bill was filed after the rendition of the decree of the 21st of November, 1907, of the Supreme Court of Appeals of Virginia affirming the decree of the 24th of June, 1907, of the Circuit Court of Rockingham County, under which the petitioner, Roller, was expressly allowed to institute other proceedings upon a quantum meruit, if he was so advised, and in this amended bill he alleged that it had been agreed that he was to receive in full satisfaction for his services rendered in connection with the litigation aforesaid an amount equal to one-fifth of the sale to George A. Wheelock herein before referred to and upon an affidavit filed by him he proceeded to attach and sought to subject by a decree of the Circuit Court of Pendleton County the tract of about 17,000 acres of land aforesaid to the payment of the debt due him and sought also to have the Court to hold that the lien given by the said George A. Wheelock to secure the purchase money due him might be enforced and held to be security for the said petitioner's claim.

In a second amended bill of complaint filed in accordance with the rules of practice in the states of West Virginia and Virginia, to meet the plea of the statute of limitations, it was alleged further that he was entitled to the amount claimed by him to-wit: $23,400.00 with interest on the several parts thereof from various dates, upon the promise of the defendant, Mary H. Murray, to pay him the reasonable value of his services and that by reason of certain acts and course of conduct by the said defendant, Mary H. Murray, no

cause of action had arisen to him, to have, demand, and receive from her just and reasonable compensation for the services rendered by him in the recovery of the tract of land in controversy as aforesaid until his right to recover the same had been repudiated by her, by her letter of the 25th of May, 1901.

It is absolutely certain, therefore, that these amended Bills of Complaint in the West Virginia case were framed upon the basis of recovery upon a quantum meruit, upon an express or implied agreement, for the value of the services rendered by the p-titioner Roller, in the litigation referred to. It did not involve the question of whether the original contract was champertous or not for it was not based upon the original contract as the amended Bills of Complaint show on their face. It is true that the defendant, Mary H. Murray, in her plea of res adjudicata claims that the suit in the Virginia Court was "for the same matters and to the same effect and for like relief and purpose" as in the West Virginia suit and claimed that she should not be compelled to make any further or other answer to the said Bills of Complaint in the said Court.

The Court of Appeals of West Virginia said in its opinion too, that

"while the bills in this case make out one different in some respects from that presented in the Virginia Court yet the vital question settled between these parties in the Virginia decision must be re-opened here in order to afford the plaintiff any relief. Mrs. Murray was his antagonist there as she is here. Wheelock and the Chesapeake-Western Company standing in privity with her were parties there as here, and all the substantial matters alleged in these bills were set up in the former suit."

The petitioner Roller filed objections to the plea of res adjudicata filed by the defendant, Mary H. Murray, and to meet the plea of the statute — limitations filed his second amended bill as required by the West Virginia law as will presently appear.

The cause came on to be heard on the 30th day of September, 1908, upon the original bill and exhibits, the amended bill, the answer of Chesapeake-Western Company, the demurrer of Mary H. Murray to the original bill and to the amended bill, upon her plea to the jurisdiction of the Court, and her plea of res adjudicata, also upon the objections of the complainant to said two pleas, whereupon the complainant amended his bill in certain particulars and Mrs. Murray renewed her demurrers to the original and amended bill upon fifteen grounds, but the Court overruled these demurrers as well as the plea of the defendant to the jurisdiction of the Court, and rejected the plea of res adjudicata and at the same time gave leave to Mrs. Murray to file her answer within ninety days from that date. Later, on the defendant having pleaded the statute of limitations to the Plaintiff's claim, the petitioner, according to the rules of practice in Courts of Equity, filed his second amended bill of complaint in December, 1909, to which the defendant, Mary H. Murray, filed certain objections in writing, her demurrer and her answer, and thereupon sundry depositions were taken and nu-

merous exhibits filed on behalf of the plaintiff and the cause matured for trial.

It was heard by the Circuit Court of Pendleton County on the 26th day of July, 1910, upon the merits, and at that hearing the said Mary H. Murray, despite the objections of the petitioner, Roller, was permitted to file a petition to rehear the decree of September 30, 1908, and a decree was entered adjudging that the said decree of September 30, 1908, was erroneous in so far as it had rejected the plea of res adjudicata, as to the estate of the defendants within the jurisdiction of the West Virginia Court and proceeded to annul and vacate its decree to that effect and to hold that said plea was a good and sufficient plea and defence to the Plaintiff's demand and accordingly dismissed the Petitioner's bills of complaint with costs.

Upon an appeal to the Supreme Court of Appeals of West Virginia, the Petitioner assigned errors in the decree of the Circuit Court of Pendleton County, as follows:

(1) In permitting the petition to be filed, to re-hear the decree of September 20, 1908, as was done by the decree of July 26, 1910, and in adjudging that that decree was erroneous in the particulars set out in the decree of July 26, 1910, and in vacating and annulling the same.

(2) In over-ruling the objections of the petitioner to the plea of res adjudicata and in holding that plea to be a good and sufficient defence to the demand set out in the original and amended bills of complaint.

(3) In entering the decree of July 26, 1910, dismissing the Petitioner's bills of complaint instead of entering a decree of recovery in his favor for the $23,400.00 with interest as claimed by him.

The Court of appeals of West Virginia on the 22nd day of October 1912, decided the cause adversely to the Petitioner Roller, overruled the assignments of error just stated, and affirmed the decree of the lower Court.

The opinion of the Court was delivered by Poffenbarger, the presiding judge, and of course, forms a part of the record in the cause.

The Court arrived at the following conclusions, to-wit: First, that the case in West Virginia, involved the same question, as the case in Virginia, and that the vital question settled in the Courts of the latter would have to be re-opened in order to afford the plaintiff any relief in the West Virginia Court.

Second. That the causes of action in the Courts of the two states respectively were not wholly different but grow out of the same transaction and the basis of the right to recover in each case was the "same contract." In order to charge the Virginia lands it was necessary to establish that contract. To charge the lands in this state it is requisite to establish the same contract."

The Court further said that, "for the purpose of the present inquiry the validity of the contract, under the law of this state, viewed independently of the Virginia decision will be assumed." In fact in none of the bills of complaint filed in the West Virginia court was any reference whatever, made to the defence of champerty, it

being well settled in that state that the common law against champertous agreements was not in force in that state and could not affect the validity and legality in any respect whatever, of the contract sued upon.

In other words, the Court of West Virginia admitted and held that this Contract which it alleged was involved in both of the causes in the two states was valid under the laws of the State of West Virginia, but held nevertheless, that inasmuch as that original contract had been declared champertous and unenforceable in the Virginia Courts, that decree was binding upon the West Virginia Courts and must be enforced under the full faith and credit clause of the constitution of the United States. So that the decree of the Virginia Court was held to be a complete bar and defence to the suit in the West Virginia Court, notwithstanding the fact that the contract was perfectly valid and legal in the latter state and notwithstanding the fact that Emily Hollingsworth with whom the petitioner Roller had contracted in the first place, so far from making any objection to the validity or legality of said contract, had confirmed the same and had actually executed the same as to the Seventeen Thousand, Fourteen (17,014) acres lying in the said State of West Virginia, a part of the lands involved in said litigation, and had conveyed to the said petitioner, Roller, an undivided one-fifth part thereof by deed duly signed, acknowledged and delivered by her to him.

Third. That although that contract related to and bound real estate within the State of West Virginia and was absolutely valid and enforceable in that State, yet that since the judgment and decree of the Virginia Courts was not a judgment in favor of the State of Virginia for a penalty inflicted as a punishment for crimes and misdemeanors, and was moreover not a penalty within the meaning of international law, it was binding upon the West Virginia Courts.

Fourth. In arriving at these conclusions the West Virginia Court had not only to hold that the decision in the Virginia Court had settled and determined the question of the validity of the contract constituting the basis of the plaintiff's claim in the suit in West Virginia, as well as that in Virginia, as the Court—erroneously, as is submitted, held—and that there could be no further trial of it between the same parties in any other litigation in which it might be material, no matter what the form of action, or character, or measure of relief, sought, and being res adjudicata in Virginia, must be so in West Virginia and precluded the relief sought in the Courts of that state, but it was compelled to hold also that the objection filed by the petitioner, Roller, to said plea of res adjudicata of the defendant, Mary H. Murray, upon the ground that the judgment or decree of the Circuit Court of Rockingham County of the 24th of June, 1907, affirmed by the decree of the Supreme Court of Virginia, was void and of no effect, because it had denied to the petitioner the right to file an amended bill of complaint and to have a hearing of the case made thereby, in which amended bill the petitioner, Roller, had alleged a statement of facts that was

absolutely good in law against, and would have completely met and over-turned the defence of champerty set up by the defendant, Mary H. Murray, in the Virginia Courts, was not good.

The West Virginia Court decided that there was no denial of due process to the petitioner, Roller, by the Virginia Courts and declared that the latter had not acted arbitrarily and oppressively.

Fifth. In arriving at these conclusions the West Virginia Court was compelled to hold also that the objection filed by the petitioner, Roller, to the plea of res adjudicata of the defendant, Mary H. Murray, upon the ground that after the rendition of the decree of the 24th of June, 1907, in the Circuit Court of Rockingham County in the Virginia case, which was subsequently affirmed on the 21st of November, 1907, by the Court of Appeals of Virginia, a chancery suit was instituted in the Circuit Court of Rockingham in the name and style of the Chesapeake-Western Company vs. John E. Roller, et als., in which the defendant Mary H. Murray, had been duly impleaded and was a defendant, and it had been adjudged and decreed therein that the issues involved in the cause then pending in the State of West Virginia had not become res adjudicata by the decrees rendered in the cause of Roller v. Murray in the Virginia Courts but that the said Circuit Court of Rockingham had by its order entered on the 10th of October, 1907, set aside and dissolved an order enjoining the petitioner, Roller, from further prosecuting in the West Virginia Courts his suit in chancery against George A. Wheelock and others in which, it was alleged, the said petitioner, Roller, had made substantially the same allegations as in his bill in the Virginia cause, at that time ended by final decree, and had prayed for the same relief as was therein sought and to the same extent, was not good.

Assignments of Error to the Final Decree of the 22nd of October, 1912, of the Supreme Court of Appeals of the State of West Virginia.

First. That that Court erred in holding that the plea of res adjudicata filed by the defendant, Mary H. Murray, in which she relied upon the decree of the Circuit Court of Rockingham County of the 24th of June, 1907, affirmed by the Court of Appeals of Virginia on the 21st of November, 1907, was a good and sufficient plea and defence to the demand of the petitioner, Roller, set up in his bills of complaint in the West Virginia Court for the simple reason that that decree had in terms provided that the same should be without prejudice to the right of the complainant—now the petitioner, Roller—to institute other proceedings upon a quantum meruit if he be so advised and the records show that the cause of action and grounds of jurisdiction and relief were not the same in the cause in West Virginia as those set out and contained in the record in cause in the Virginia Court vouched, in the said plea of res adjudicata, as part thereof, but was based upon a demand upon a quantum meruit for just and reasonable compensation for serv-

ices rendered by the petitioner, Roller, in and about the recovery of the tract of land in controversy.

The case in West Virginia was a suit in equity as allowed by the statutes of that state to attach and subject that part of the Hollingsworth survey which lies in the County of Pendleton in that State to the payment and the satisfaction of the demands of the complainant, for compensation for his services rendered in connection with the litigation aforesaid.

Second. That that Court erred in refusing, to hold that the Court below had erred in refusing to decree that the plea of res adjudicata should not be entertained by that court upon the ground that the decrees in the Virginia Courts presented in said plea were void and of no effect, because they had denied to the petitioner, Roller, due process of law, in that they had denied to him the right to file the third amended bill of complaint tendered by him, and denied him a hearing upon the case thereby presented, in which the petitioner, Roller, as he averred had made the statement of a case good in law against the defence of champerty set up in the Virginia Courts, and in that particular the court had decided that there had been no denial of due process of law in the Virginia Courts.

Third. That that court erred in refusing to hold that the court below had erred in not sustaining the objections made by the petitioner, Roller, to the filing of the plea of res adjudicata, as being well taken, the same being based upon the fact that in the cause of Chesapeake-Western Co. v. John E. Roller, et als., it was held and decided necessarily, by the decree entered in that cause, that the matters involved in the cause in the West Virginia Courts were not res adjudicata by the decrees rendered in the first cause of Roller v. Murray, hereinbefore set forth.

It follows necessarily that if either of these assignments of error is sustained and the decree of the Supreme Court of Appeals of West Virginia is reversed, then the application of the "full faith and credit clause" of the Constitution to the decree of the Virginia Courts must fall. It will be made to appear, however, in this petition as is submitted by the petitioner, Roller, that the ruling of the Court of Appeals of West Virginia was erroneous as to that matter, also in any event.

Argument Upon the Assignments of Error.

I. Upon the First Assignment of Error.

It is submitted that upon the face of the second and third amended bills of complaint in the West Virginia record now before the Court and on the face of the several bills of complaint in the cause decided in Virginia on the 24th of June, 1907, affirmed by the decree of the Court of Appeals of November 21st, 1907, the cases were wholly different and the latter could not be pleaded as res adjudicata in the West Virginia case, because the causes of action and grounds of jurisdiction and relief were plainly not the same, and were not based upon the same contract as a cause of

action and the decision in the Virginia Courts did not determine the questions presented in the West Virginia Court and now embodied in this record, so that the West Virginia Court denied the petitioner due process of law in holding that the contract was the same and had no greater validity or force in the courts of that State than they had in Virginia when plead or proven. And this assignment of error involves the following questions:

1. The contract involved in this controversy was a Pennsylvania contract and its validity and enforcement in the courts of West Virginia did not depend upon the decision of the Virginia courts as to its validity and enforcement in that state, but demanded an independent and separate consideration of the question in West Virginia and the courts of that State, by its failure to give such independent and separate consideration and determination of the question as to its validity and enforcement in that state, was a failure to give due process of law to the petitioner and when it applied the decision of the Virginia court to the determination of the question in the State of West Virginia and enforced the decision and determination of the Virginia court, it deprived the petitioner of his right of action in the West Virginia courts without due process of law.

2. That moreover the written contract of 1875 shows on its face that the terms thereof, so far as it related to the State of West Virginia, and the property was in the jurisdiction of that State, and the contract rights under the laws of that State were wholly and vitally different from what they were as to the State of Virginia and that the West Virginia court in holding that they were the same and in refusing to recognize the West Virginia contract, and the right of the petitioner to have its validity and right of enforcement determined by the courts of that State, deprived the petitioner of such right in the West Virginia courts without due process of law.

See Osborne vs. Nicholson, 13th Wallace, 654.
Pritchard vs. Norton, 106 U. S., 124.

II. Upon the Second Assignment of Error.

It is submitted that the petitioner, Roller, had been denied due process of law in the Virginia courts in this that the Circuit Court of Rockingham County, the inferior court of that State, had arbitrarily and unlawfully rejected his third amended bill tendered to that court in March, 1907, and that this action had been affirmed by the Supreme Court of Appeals of that State on the 21st of November, 1907.

It will be observed that the petitioner, Roller, especially insists upon his right to a writ of error to the decree of the supreme court of appeals of West Virginia upon the ground that that court had erred in its analysis of the proceedings had before the court in Virginia, and the decision of that court. It said:

"Here, the plaintiff had been allowed a hearing. He had filed "an original and two amended bills and had no doubt had an "opportunity to tender the third amended bill long before the "submission of the cause. It is certainly competent for a Court

"to say, within reasonable limits, what amounts to a compliance "with its rules and the principles of law, respecting the order and "limitations of proceedings in a case. Besides in the opinion of "the court the proposed amendment would not have changed the "character of the plaintiff's claim, nor relieved the contract of its "infirmity. An erroneous decision in respect to either of these mat-"ters would not amount to a denial of due process of law. As to "them, it is not a case in which the plaintiff had had no day in "Court."

The record shows that the court had taken over five months in which to consider and decide the case. It had been submitted on the 13th of October, 1906, and was not decided by the court until the 19th day of March, 1907.

The petitioner, Roller, in his amended and supplemental bills of complaint, in which he produced and filed the lost contract of the 10th of July, 1875, which had theretofore been mislaid and which on its face was free from any possible objection on the ground of champerty, and upon which as a part of his amended and supplemental bill, he sought and obtained an injunction order against the Pocahontas Company an insolvent defendant who was engaged in denuding the entire survey of 52,000 acres of land in controversy, of all merchantable timber and tan bark to the great damage of both parties to the controversy, had the right to expect that this contract being free from the objection that had been raised to the MacMurtie letters of 1873, being as it was the final repository of the terms and conditions of the agreement between the parties in interest, would be held to be free from the objection of champerty especially upon a case presented upon his bill of complaint, by the demurrer of the defendant, Mary H. Murray, thereto, which admitted the truth of the allegations of the bill and that no possible objection could be made to it upon that ground.

It was only within a few days after the decision of the Court had been announced in which the court read into the contract of the 10th of July, 1875, the "McMurtrie letters" and held that the vice of champerty applied also to that contract and that the necessity, therefor, arose, that the third amended bill was tendered to the court. The cause had only been prepared and submitted for trial for the October term, 1906, of the court and the defence of champerty had been set up by Mary H. Murray, by her demurrer of September 19th, 1906. It is true that the petitioner, Roller, had filed theretofore an original and two amended bills of complaint, but the first amended bill had been filed in order to comply with the court's decree which required him to allege whether or not the contract under which he claimed was in writing or not, and if it was to produce it, and the last amended bill was filed under the rules of practice and pleading in the courts of equity of Virginia and West Virginia as being the only pleading by which the plea of the statute of limitation could be met.

Surely neither the patience nor the discretion of the court had been exhausted by these amended bills. They were in fact necessary

parts of the pleadings. It is true that the court in its opinion says that the bill has been amended twice already and that,

"a due regard to the orderly procedure of the court and the rights "of the opposing party, require that some limit, be set to the "privilege of amendment."

If the action of the court rests on this proposition of law, then it is submitted, with all confidence, that the court acted arbitrarily, in denying the amended bill and that its action was inconsistent with the well established usages and principles of the law of equity.

The rule as to amendments to pleadings in equity is thus stated in Story Equity Pleadings, section 883:

"Amendment Allowed at All Stages.—As in courts of equity mispleading of form is never allowed to prejudice any party, the real and substantial merits of the case are always looked to. No exception to formal minutiæ in the pleadings are usually insisted on or, if insisted upon, they are never allowed by the courts to prevent a hearing upon the merits.

"SEC. 885. If the plaintiff, after he has filed his bill, finds that he has omitted to state any matter or to join any person as a party to the suit, which he ought to have done, he may supply such defects by an amended bill. Or, if after the defendant has put in his answer, the plaintiff thereby obtains new light as to the circumstances of his case he may amend his bill in order to shape his case accordingly. And in general, any imperfection in the frame of a bill may be thus remedied as often as occasion may require."

In 18 Cyc. of Law Procedure, p. 347, &c., title, "Equity", the rule is stated thus:

"While amendments in formal matters and in the early stages of the case in matters of substance are permitted with great liberality, the allowance of the amendment at any stage, in the absence of statute or rule to the contrary, rests in the discretion of the court and an order must be obtained granting leave. Therefore an amendment which would otherwise be proper may be disallowed if it is clear that it could not be substantiated or if relief could not be granted upon the bill when amended."

In the same volume, p. 283, when a demurrer has been sustained, it is said.

"In the United States the practice is quite liberal and it is said that where the bill discloses merits, the court on sustaining the demurrer, must give leave to amend the bill."

If it is absolutely certain as this petitioner claims it to be, that the third amended bill leave to file which was refused by the State Court, would have removed from the previous bills, the grounds upon which the contract in controversy could be held to be champertous, then to have given the petitioner a hearing upon the merits of his claim, would have caused that claim to have been allowed him in full, and would not have deprived him of it without due process of law, as it did in fact.

The absolute right to amend is not discretionary with the court in such a case.

One who has acquired rights cannot be deprived of them without notice and an opportunity to be heard.

See Garfield v. Goldsby, 211 U. S., 249.

"There is no place in our constitutional system for the exercise of arbitrary power."

It is submitted that the Virginia courts had no discretion to refuse to allow the third amended bill to be filed.

But even if the courts had such discretion it is the law of the land, too, that it is not due process of law if,

"such discretion was exercised either with intent or so as to deprive the petitioner of any right or immunity to which he was entitled under the Constitution or laws of the United States or of the privilege of setting up or claiming in due time and in proper form any such right or immunity."

See Ripley v. Illinois, 170 U. S., 188.

So that if the filing of this amended bill was denied the petitioner by the Virginia Courts in the cause in that state without even any intent to deprive the petitioner of his rights, yet, if the effect of it was to do so, due process was denied him.

It is true that the court said that "the amendments are offered without explanation or excuse, and in the main are unsubstantial and would not change the opinion of the court on the merits of the case."

But it is also true that the court says:

"Paragraph No. 1 sets out that before the original contract between Compt. and Miss Hollingsworth was made, it was understood and agreed that a compromise could be and was to be effected with the adverse claimants of 13,800 acres of the land in dispute, and that these adverse claimants had been advised by their counsel that their title was worthless, and that the agent of Miss Hollingsworth was so advised by Complainant, and further that such a compromise would have furnished sufficient property belonging "to Miss Hollingsworth to provide for the payment of costs."

And that it also says that:

"This was prior to the contract between Gen. Roller and Miss " Hollingsworth and not a part of that contract."

But that paragraph shows on its face that the understanding and agreement between the petitioner, Roller, and Emily Hollingsworth as to the making of this compromise, was "prior to the correspondence," known as the "McMurtrie letters" and that the effect of this agreement was that the tract of 13,800 acres or the larger part thereof was available for the purposes of paying cost and expenses of any litigation that might be had over the remainder of the original survey and that it was more than ample for said purposes, and that it was in view of this fact that petitioner, Roller, was willing to advance the expenses in Virginia knowing that there were ample resources available for the payment and discharge thereof out of property belonging to Emily Hollingsworth.

It was an exceedingly arbitrary and unjust and incorrect statement therefore which declared that this prior agreement was not a part of the contract under which petitioner, Roller, undertook to advance expenses in Virginia.

Not only was such a ruling arbitrary and unjust but it shocks the *normal* sense of many just and honorable men. It was made without argument and without proofs and without a hearing upon the third amended bill.

Yet it is this ruling which must be approved and affirmed as a just, upright and equitable decision in a matter, upon a full hearing, and, upon argument and proofs, such as would make it due process of law.

It is most earnestly contended that if there had been such full hearing upon argument and upon the proofs, the result of the case would have been that the third amended bill would have been filed under leave of court, in accordance with the law as to amendment, of pleadings in equity causes, and that upon a hearing upon argument and proofs the court would have held that the defence of champerty had been met and overturned and that the petitioner, Roller, would have been awarded the decree sought by him.

It will be observed that neither the opinion of the court nor its decree claims for one moment that the complainant had been heard either upon argument or upon proofs upon this proposed third amended bill.

The bill was not allowed even to be filed—it was merely lodged with the papers of the cause. It appears that no argument was heard upon it, but upon the contrary that the court arrived at its own conclusions, in its own way, without regard to any light that might be thrown upon the matter either by argument or by proof.

It will be especially noted that two of the defendants, the Chesapeake Western Company and the Pocahontas Company were allowed on that very day, the 24th of June, 1907, to present and file their joint and separate demurrer to the original and amended and supplemented bills of complaint and the decree recites that this demurrer was presented and filed by leave of court after the decision of the case, but before the entry of the decree, and that demurrer, thus filed at that late day and which went to the whole cause of action as set forth in said original and amended and supplemented bills of complaint as not being sufficient in law and equity and raised anew the whole contention without any exception therefrom in the slightest particular whatever, was sustained in that decree.

The Complainant was held not to be entitled to amend his bill on the ground that (1) There should be some limit to the right of amendment, and (2) it had only been tendered after a thorough argument of the case on its merits and after the decision of the court had been announced. But that demurrer was alike offered "after the court had heard the full argument and had announced its decision" and raised the whole question whether the case of the complainant as presented in his original and amended and supplemental bills of complaint was good in law or in equity.

It is submitted that the court acted in a most unreasonable and

arbitrary way in denying the petitioner, Roller, the right to file his third amended bill in allowing it only to be lodged with the papers of the cause and in granting no hearing to the petitioner, Roller, upon argument and upon proofs under pleadings regularly made up, and the authorities unmistakably hold that such action as this does not constitute due process of law.

In the very late case of Twining v. New Jersey, 211 U. S., page 110, etc., it is said:

"Due process requires that the court which assumes to determine "the rights of parties shall have jurisdiction. Pennoyer v. Neff, "95 U. S., 714, 733; Scott v. McNeal, 154 U. S., 34; Old Wayne "Life Association v. McDonnough, 204 U. S., 8, and that there shall "be notice and opportunity for hearing given the parties, Hovey. "v. Elliott, 167 U. S., 409; Roller v. Holly, 176 U. S., 398; and "see Londoner v. Denver, 210 U. S., 373. Subject to these two "fundamental conditions, which seem to be universally prescribed "in all systems of law established by civilized countries, this court "has up to this time sustained all state laws, statutory or judicially "declared, regulating procedure, evidence and methods of trial, and "held them to be consistent with due process citing many cases."

Denial of Due Process.

The special privilege or immunity which was denied the petitioner when the court refused to allow him to file his amended bill was the right to be heard by argument if necessary and if need be, upon proofs on a bill whose allegations were sufficient to have made good every part of his case to its full extent.

"Many requirements essential in strictly judicial proceedings may "be dispensed with in proceedings of this nature. But even there a "hearing in its very essence demands that he who is entitled to it "shall have the right to support his allegations by argument how-"ever brief, and if need be by proof, however formal."

Pittsburg, &c., Railroad Co. v. Backus, 154 U. S., 421.
Fallbrook Irrigation Dist. v. Bradley, 164, 426 U. S., 112, 171, et seq.

"It is apparent that such a hearing was denied to the plaintiff in "error."

To constitute due process of law there must be a regular course of judicial proceeding with full opportunity to the parties in interest to be heard in their defense and the cause fully heard on its merits.

See Brannon on the Fourteenth Amendment, p. 141.
Brown v. Gorman, 213 U. S., p. 112.
Central Land Co. v. Laidley, 139 U. S., p. 112.

In the case of Com. Comm. v. Louis. & Nash. R. R., 227 U. S., page 91, it is declared as to mere administrative orders, quasi-judicial in character, they are void "if a hearing was denied; if that

granted was inadequate or manifestly unfair; or if the finding was contrary to the "indisputable character of the evidence."

Tang Tun v. Edsell, 223 U. S., 673, 681.
Chin Yoh v. United States, 208 U. S., 8, 13.
Low Wah Suey v. Backus, 225 U. S., 460, 468.
Zakonaite v. Wolf, 226 U. S., 272.

In the case of Oregon Railroad v. Fairchild, 224 U. S., 570, cited above the "hearing which must precede an order taking property must not be a mere form."

"Due process requires that the cause must be fully heard in the "regular course of judicial proceeding. It does not tolerate unusual "and arbitrary action. It must follow the forms of law, be appro- "priate to the case and just to the parties to be affected."

See Bonner v. Gorman, 213 U. S., 86.
Giozza v. Tireman, 148 U. S., 567, and many other cases.

It is declared also that a review of the decision of the State Court is absolutely necessary where there has been an "arbitrary exercise of power."

"A deprivation of property without due process of law occurs when "it results from an arbitrary exercise of power inconsistent with "those settled usages and modes of proceeding existing in the statute "and common law of England before the emigration of our ances- "tors and which are shown not to have been unsuited to their civil "and political condition by having been acted upon by them after "the settlement of this country."

See Vandalia R. R. v. South Bend, 207 U. S., 367.

In United States v. Billings, 190th Federal Rep., p. 359, it is said:

"Due process implies the administration of equal laws according "to established rules by competent tribunals, having jurisdiction "and proceeding upon notice and hearing."

In Simmons v. Craft, 182 U. S., p. 427, it is said:

"The essential elements of due process are notice and an op- "portunity to defend and in determining whether such rights were "denied one, are governed by the substance of things and not "by mere form."

"The constitutional provision that no person shall be deprived of life liberty or property without due process of law extends to every proceeding of a state or by authority of a state, by any of its agencies upon the several matters involved, which may interfere with those rights whether judicial, administrative or executive, and,

"A state may not by any of its agencies disregard the prohibitions "of the Fourteenth Amendment. Its judicial authorities may keep "within the letter of the statute prescribing forms of procedure in "the courts and give the parties interested the fullest opportunity "to be heard, and yet, it might be that its final action would be "inconsistent with the amendment. In determining what is due "process of law regard must be had to substance, not to form."

See C., B. & Q. R. R. vs. Chicago, 166 U. S., 234.

In Dryfoose v. City of Montgomery, 58 Southern Reporter, page 730, it is said that:

"Due process is assured if the law does not subject the individual to an arbitrary exercise of the powers of government."

"Due process is a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial."

See Darmstarter v. Passan, 79th Atlantic, page, 540.
Ives v. Buffalo Railroad Co., 201 New York, page 271.

In Oregon v. Fairchild, 224 U. S., p. 524, it is declared that:

"Where the taking is under an administrative regulation, the "defendant must not be denied the right to show as a matter of "law that the order was so arbitrary, unjust and unreasonable as "to amount to the deprivation of property in violation of the Four-"teenth Amendment."

Chicago, &c., R. R. v. Minnesota, 134 U. S., 418.
Smythe v. Ames, 169 U. S., 466.
Chicago, &c., R. R. v. Thompkins, 176 U. S., 167, 173.

"The validity of the order cannot be sustained merely because "of the fact that the carrier had been given an opportunity to be "heard, but was to be tested by considering whether in view of all "the facts the taking was arbitrary and unreasonable.

"For the guaranty of the constitution extends to the protection "of fundamental rights—to the substance of the order as well as "to the notice and hearing of this proceeding.

"The carrier must have the right to secure and present evidence "material to the issue under investigation. It must be given the "opportunity by proof and argument to controvert the claim as-"serted against it before a tribunal bound not only to listen but to "give legal effect to what has been established."

See Oregon v. Fairchild, 24 U. S., 523, 524, 525.

Sufficiency of the Averments of the Third Amended Bill.

Due process was denied if the averments of the amended bill tendered to the Court and not allowed to be filed, were sufficient to have met and over-turned the defence of champerty, and give the petitioner, Roller, the relief he sought.

As to the importance of the averments in the third amended bill, it is respectfully submitted:

1. First. That the Federal Courts will determine what is the law in reference to doctrines of commercial law and general Jurisprudence—in any case—upon their own authorities and according to their own decisions and will not accept the decisions of the State Court.

It is said that:

"While rules of property and of action in the State are always "regarded by the Federal Courts, the Federal Courts exercise their

"own judgment in reference to the doctrines of commercial law and "general jurisprudence."

See Pleasant Town v. Ætna Ins. Co., 138 U. S., 68.
Lake Shore v. Prentice, 147 U. S., 101.
Kuhn v. Fairmont Coal Co., 215 U. S., 39.

2. Second. The Federal Courts are not bound by the decisions of the State Courts where private rights are to be determined in such cases by the application of common law rules alone.

See Chicago v. Robbins, 2 Black, 418.
Hill v. Hite, 29 C. C. A., 55.

Nor will the decisions of the State Courts be followed to such an extent as "to sacrifice truth, justice or law."

Fulkner v. Hart, 82 N. Y., 416.
Lane v. Vick, 3 How., 462.
Foxcraft v. Mallery, 4 How., 353.
Loan Co. v. Harris, 113 Fed. Rep., 36.

In Lane v. Vick, 3rd How., 464, the court refused to agree with the State court in the construction of a will in that case and based its opinion upon the fact that the correctness of the decree of the Federal Court "was strengthened by its justice to all the parties interested," and in its opinion the court argued that the testator "could not have had the heart of a dying father," to have intended to cut off his daughters from all interest in his real estate.

While in Foxcraft v. Malley, 4 How., 377, the court refused to follow the judgment of the State court upon the distinct ground that "the general aspect of the whole case was strongly affirmative of the right set up by the defendant" and insisted that its construction was in conformity to the original design of the parties thereto, and that this was "both legal and laudable" and proceeded to show that its construction of the deeds in that case brought about justice and defeated injustice and for that reason disregarded a different decision between the same parties in the State Court.

The case of Loan Co. v. Harris, 113 Federal Reporter, 36, was another case in which the court refused to follow the opinion of the State Court to such an extent as to "sacrifice either truth, justice or law."

Surely no case was ever presented to the Court in which a greater injustice was done to a party litigant than that presented to the court in this petition.

The question presented by this petition for a writ of error is what were the rights of petitioner, Roller, in the cause before the court and what are the principles which should receive the approval of the Supreme Court of the United States in regard thereto.

1. In the first place it is well settled that, "agreements to pay "contingent compensation for professional services of a legitimate "character before the courts or departments of the government of "the United States or commissions appointed under treaties, to ex-

"amine claims, are not in violation of any rule of law or public "policy."

See 6 Cyc. of Law and Pro., p. 861, Note 43 and authorities there cited.

Agreements for contingent fees are valid and not champertous in any case.

McPherson v. Cox, 96 U. S., 404, and other cases cited above.

But in the next place it is not intended to overlook the case of Peck v. Heurich, 177 U. S., p. 630, in which the following principle was laid down, as the opinion of the Court at that time:

"But according to the common law, as generally recognized in "the United States, wherever it has not been modified by statute, "and certainly as prevailing in the District of Columbia, an agree- "ment by an attorney at law to prosecute at his own expense a "suit to recover land in which he personally has and claims no "title or interest present of contingent, in consideration of re- "ceiving a certain proportion of what he may recover, is contrary "to public policy, unlawful and void, as tending to stir up baseless "litigation."

Citing:

4th Kent Com., 447, Notes.
McPherson v. Cox, 96 U. S., 404-416.
Stanton v. Haskin, I McArthur, 558.
Johnson v. Van Wyck, 4 App. D. C., 294.
Brown v. Beauchamp, 5 T. B. Monroe, 413.
Belding v. Smyther, 138 Mass., 530.
Stanley v. Johns, 7 Bing., 368, 377.
S. C. Moore & Payne.

It will be noted however that among the authorities cited in the above opinion, are those of Stanton v. Haskin, 1 McArthur, p. 592, and Johnson v. Van Wyck, 4th App. D. C., 294, both from the District of Columbia.

In the former case the Court in deciding the same said:

"We doubt the justice of these rules—against champerty and "maintenance—in the present condition of the profession—and "we think lawyers may be trusted to provide for their compensa- "tion according to the fund that may be collected or recovered "by their skill and diligence in conducting an important and val- "uable claim. All agreements made for mere contingent compen- "sation are generally meritorious and should be enforced. The "most respectable counsel conduct immense litigation with no other "hope of reward,"

1 McArthur, p. 592.

In both of these cases, the case of Brown v. Vigne, 21 Oregon, 260, is cited as an authority supporting the principles approved by the Courts, of the District of Columbia, and by the Supreme Court of the United States, and in that case it was distinctly held that a contract between attorney and client which charged the land to be

recovered with the costs of litigation was not champertous and was not illegal and void.

The principle is laid down in the following language:

"The doctrine of champerty is directed against speculation in law suits and to repress the gambling propensity of buying up doubtful claims. It is not, nor never was, intended to prevent persons from charging the subject matter of the suit in order to obtain the means of prosecuting it. 1 Addisio, Cont., 392, Stonsevburg v. Marks, 79 Ind., 193" (14 L. R. A., 749).

IV. In the case of Stanton v. Haskin, 1 MacArthur, p. 592, it has been held from the beginning in distinct terms:

"That though such contracts be champertous they will be regarded as security for whatever the attorney may have advanced or what his services are really worth."

The Supreme Court of the United States must surely entertain the same views for it has quoted these cases in support of its own decisions without any dissent therefrom or even criticism thereof.

But, later and still more significant is the fact that, "in the recent case of Ingersoll v. Coram, 211 U. S. Rep., p. 335, the court held that the estate of Robert G. Ingersoll was entitled to a fee of $100,000.00, with interest thereon and costs, and that the contract for its payment should be enforced, notwithstanding the fact that the litigation was conducted under a contract by which the respondents were to carry on the litigation, procure the evidence and employ counsel at their own expense.

The court held that the security held by Col. Ingersoll's Estate, to-wit: the assignment by the contestants to Col. Ingersoll of $100,000.00 out of certain shares in the estate contingent upon his success in preventing the probate of a will, constituted an equitable lien on the distributive shares to which the contestants were entitled, upon a settlement, which was effected by his successful services.

2. It is submitted therefore that the law of the land under the great weight of authority is that an agreement between an attorney and client to charge the subject matter of a suit in order to obtain the means of prosecuting is not champertous.

3. It is submitted finally that inasmuch as in the case presented in this petition it is shown that it was agreed that not one cent of cost should be incurred in the litigation, nor would the petitioner, Roller, even undertake the case, as attorney, until a compromise was made which would give at least 8,800 acres to the owner of the property, of the value in the beginning of $1.00 an acre, was subsequently sold for three times that amount and which would provide ample funds for the payment of all possible costs and expenses in recovering the remainder of the survey and that this property was charged with the repayment of any costs and expenses in the litigation paid by said petitioner, Roller, by express agreement, it cannot be said that such agreement was champertous.

In addition to the authorities already cited in this brief this petitioner refers to Weeks on Attorneys at Law, page 588, in which the following principle is laid down:

"Attorneys and solicitors have long been accustomed in England

to make the necessary advances for fees and other necessary expenses of suit, with a view to future re-payment, and the practice has been considered free from objection."

The learned author refers to 2 Coke, Institutes, 484 and 564, and 1 Hawk. P. C., 254, Sec. 27, authorities which are hoary with age.

It is earnestly submitted in the conclusion of this argument upon the second assignment of error, that inasmuch as the petitioner was granted the mere privilege of making a motion or application to file a third amended bill, which bill was so material and powerful that it would have changed the result of the case, and such mere motion or application, without argument thereon and without the amended bill having been filed, and proofs taken thereon, however formal, was overruled and refused, then such action was arbitrary and unjust—it sacrified "truth, justice and law;" and the petitioner was not given such hearing upon the merits, as the importance and justice of the case required, and such action did not constitute due process of law and must be awarded a writ of error.

3. Upon the Third Assignment of Error.

This assignment of error relates to the refusal of the Court of Appeals of West Virginia to hold that the Circuit Court of Pendleton had erred in not sustaining the objection made by the petitioner, Roller, to the plea of res adjudicata as being well taken, based upon the record of the cause of the Chesapeake-Western Company v. John E. Roller et als., the claim being that it had been decided in that cause, that the matters involved in the case in the West Virginia courts were not res adjudicata by the decrees rendered in the first cause of Roller v. Murray in the Virginia courts.

The opinion of the West Virginia Court on this issue was that

"The record fails to show that the decree or order of October 10,
" 1907, involved the merits, and also clearly indicates that it did
" not. There is no inflexible rule as to the effect of a dissolution
" of an injunction upon subsequent litigation between the parties.
" It depends upon the intention of the Court, as disclosed by the
" state the pleadings and the terms of the order, unless the cause has
" been finally disposed of, and even then the dissolution may have
" resulted from lack of ground for the extraordinary writ, and not
" carry any implication of a determination of any question affecting
" the merits. Being interlocutory, the *the* order of dissolution need
" not affect the merits. Presumptively it does not. To make it
" binding should it not affirmatively appear to have been an adjudi-
" cation upon the merits in terms or legal effect. Our decisions say
" so. Gallaher v. Moundsville, 24 W. Va., 730; Fluharty v. Mills,
" 49 W. Virginia, 446; Staley v. Railroad Co., 63 W. Va., 119."

A careful examination of the last case cited in the foregoing opinion that of Staley v. Big Sandy R. R. Co., 63rd W. Va., 119, in connection with the record before the court will show plainly that the decree of the 10th of October, 1907, in the case of Chesapeake-Western Company v. John E. Roller, et als., was a decree upon the merits dissolving the injunction and was to that extent a final decree and should have been held to be res adjudicata.

The principles laid down by the Court of Appeals of West Virginia in the case of Staley against the Big Sandy R. R. Co. are thus stated in the opinion of the court.

"We observe, therefore, that since there can be a reinstatement of " an injunction dissolved on bill and answer, at any time during the " further progress of the cause or at the hearing on the merits, there " is no finality in the dissolution order of October 6th, 1903. It is " finality of the suit that bars, not mere dissolution of the injunction, " retaining the cause for further hearing. All this is consistent with " the decisions of this court. In Fluharty v. Mills, 49 W. Va., 446; " 38 S. E., 521, it is held: "A decree dissolving an injunction upon " the merits, where no relief but injunction is sought, is final and " res adjudicata." Note here the words "upon the merits." Observe " them also in Gallaher v. Moundsville, 34 W. Va., 730; 12 S. E., " 859; 26 Am. St. Rep., 942. "An order dissolving an injunction " based on the merits of the case, where the only relief sought by the " bill is such injunction is, as regards finality, such a decision as " will sustain the defence of res adjudicata. The same distinction " applies in Burner v. Henever, 34 W. Va., 774; 12 S. E., 861; 26 " Am. St. Rep., 948, where the same words, 'upon the merits' are " used. Each of these cases involved a decree on the merits, which "was pleaded in bar—a decree ending and foreclosing the matter " litigated."

Now in the record referred to an injunction was sought against the petitioner, Roller, to enjoin and restrain him from further prosecuting in the Circuit Court of Pendleton County in West Virginia, his suit in Chancery, the record of which is now being considered, upon the distinct grounds that he had made therein substantially the same allegations as in his bill in the Virginia cause and prayed the same relief as was there sought, and to the same extent and that the matters involved in said last named West Virginia cause were res adjudicata by the decree of the Virginia Court and upon this allegation and no other whatever, the injunction was awarded on the 16th of July, 1907.

It is submitted that it is manifest that the Court erred when it said that the record in that cause did

" not carry any implication of a determination of any question af- " fecting the merits. Being interlocutory, the order of dissolution " need not affect the merits. Presumptively it did not. Then to " make it binding, should it not affirmatively appear to have been " an adjudication upon the merits in terms or legal effect? Our " decisions say so. Gallaher v. Moundsville, 34 W. Va., 730; 12 " S. E., 859; 26 Am. St. Rep., 942; Fluharty v. Mills, 49 W. Va., " 446; 38 S. E., 521; Staley v. Railroad Co., 63 W. Va., 119; 59 " S. E., 946."

It is submitted that the record shows clearly, exactly the contrary.

While it is true that the defendant, Roller, was granted leave to plead, answer or demur to the bill of complaint, it is certain that such leave was not intended to apply to the injunction order, for as to that, he had all the decision and all the decree that he wanted, or could get, to-wit, that he could not be enjoined from prosecuting

his suit in West Virginia, because of the decree adverse to him in the Virginia Courts.

Stanley v. Big Sandy R. R. Co., 59 S. E., pp. 48-49, is an authority in our favor rightly understood. It cites Story Eq. Pl., 793, where it is said "that if the decree does not expressly say, 'without prejudice' it is final and res adjudicata." Black on Judg'ts, p. 874; 16 Cyc., p. 469.

The record shows that on the 10th of October, 1907, the cause was heard on the bill and exhibits, including a printed copy of the record No. 1226 of the case in the Supreme Court of Appeals of Virginia, and that upon the motion of the petitioner, Roller, the injunction was dissolved. This was a hearing upon the merits and could have been nothing else, and was not interlocutory. It was a hearing upon record evidence and was an adjudication upon the merits. No other evidence could be admitted or adduced, and by no possibility could there be any other adjudication than upon the merits.

The decree of dissolution shows that the appeal to the Court of Appeals of Virginia had been perfected and the record had been printed and the cause was ready for trial at the September court, 1907, of the Court of Appeals of Virginia. The defendant, Roller, had been granted a suspending order on the 29th of June, 1907, for ninety days to enable him to apply for an appeal. The injunction was granted on the 16th of July, 1907, before the appeal was allowed. The appeal was granted on the 2nd of August, 1907, and the appeal had been perfected and the record had been printed prior to the 10th of October, 1907, the date at which the injunction was dissolved.

As long as the decree appealed from stood reversed the petitioner, Roller, had no right to prosecute his cause in the West Virginia court for the same cause of action and upon the same contract and if he was doing so that decree was res adjudicata in both suits, that in West Virginia as well as Virginia, and the injunction order could not have been dissolved. Yet the Virginia court held that the decision in the Roller v. Murray case in Virginia, was not res adjudicata of cause of action on which the West Va. case was based and dissolved the injunction.

It was heard upon the original copy of the bill of complaint in the West Virginia court and a printed copy of the record of the cause in the Virginia courts and no other evidence was either admissible or proper. It was not a hearing therefore upon the bill and answer merely—as in the cases referred to in Staley v. Big Sandy R. R.

It was a case in which evidence was adduced on both sides and new evidence could only be introduced after such a hearing and decree under the rules applicable to after discovered testimony. So there could by no possibility be any change whatever in the decision of the court, or in the decree dissolving the injunction.

There was no pretence that there was any such after discovered evidence or that there could be any rehearing of the cause upon new or additional evidence but on the contrary, the Chesapeake Western Company regarded the decree as "concluding and fore-

closing the matter litigated" and proceeded to arrange for an appeal within sixty days.

The final order in that cause dated August 1st, 1908, retired the case from the docket and makes no reference whatever in the slightest particular to the injunction order awarded against petitioner, Roller, and the court's decree dissolving same, treated the latter as final, and by such final decree of August 1908 made the decree of October 1907 final also.

It is submitted in conclusion that the Supreme Court of Appeals of West Virginia and the Supreme Court of the United States in reviewing the decision of the former court have the incentive for rejecting the plea of res adjudicata pleading the decision of the Virginia courts in bar of a recovery, in favor of the petitioner, Roller, in the courts of West Virginia, in the fact, that it is admitted that the doctrine of champerty does not exist in that state, and not only that the Supreme Court of Appeals of West Virginia has held this but has declared that there was honest champerty in some of the cases decided by it and held in Davis vs. Settle, 36 W. Va., p. 1, that:

"There should be honesty even among opposing litigants towards "the attorneys of their oppressors. Attorneys' fees should not be "less sacred than other obligations, and they should respect each "other's right with regard thereto. Much disrepute has been "brought on the profession, not more by the charge of extortionate "fees than the disposition on the part of the profession to disparage "the services of other members thereto, and to lend their aid to any "scheme which will enable others to prevent an attorney from "reaping the reward of his labors as a punishment to him for having sustained the cause of an opposing litigant."

It is submitted too that a reversal of the decree of the West Virginia Court of Appeals would relieve it from the objection that could be made to it, to-wit: That it had overturned and set aside, upon the defence of champerty, held by the Virginia Courts to apply in the case, all of that part of the contract between petitioner, Roller, and Emily Hollingsworth under whom the defendant, Mary H. Murray, claims, which had been executed, when under well settled principles this could not be done and the vested rights secured thereby could not be defeated and overturned.

In the Supreme Court of the United States in Bibb vs. Allen, 149, U. S., p. 495, the principle is thus stated:

"But aside from this, and independent of the question whether "the bought and sold notes called the 'slip contract' constitute a "compliance with the statute of frauds, the contracts were fully "executed and the transactions closed before the plaintiffs com-"menced the present suit. It is well settled by the authorities that "the defence of the statute of frauds cannot be set up against an "executed contract. Dodge vs. Crandall, 30 N. Y., 294, 304; Brown "vs. Farmer's Loan and Trust Co., 117 N. Y., 266, 273; Madden vs. "Floyd, 69 Ala., 221, 225; Gordon Rankins & Co. vs. Tweedy, 71 "Ala., 202, 214; Huntley vs. Huntley, 114 U. S., 394, 400; Browne "on Stat. of Frauds, Sec. 116."

Upon this petition for writ of error and the record accompanying

same it is submitted that the petitioner is entitled to a writ of error to the Supreme Court of the United States and he prays that the same may be allowed and that the said decrees of the West Virginia Courts may be reviewed, reversed and annulled, and he will ever pray, etc.

JOHN E. ROLLER,
In Propria Persona.

Supplement.

JOHN E. ROLLER, Petitioner,
vs.
MARY H. MURRAY et als.

Supplement to Petition for Writ of Error in the Above Entitled Cause.

The question presented by the third assignment of error in the foregoing petition, is, whether or not the decree of October 10th, 1907, in the cause of the Chesapeake-Western Company vs. John E. Roller, et als., was a decree upon the merits, such as to make it res adjudicata of the same question, between the same parties, in the cause, in West Virginia, or was it merely an interlocutory decree, deciding nothing, as the Court of Appeals of West Virginia held it to be.

The decision of this question will absolutely control, that, of the correctness of the decree, of the Court of Appeals of West Virginia.

In order to present the question, as fully as its importance demands, the petition on this point, has been re-written and the whole matter presented anew.

It appears from the transcript of the record, of the case, in the Court of Appeals of West Virginia, that the injunction order in the cause referred to, of Chesapeake-Western Company was awarded on the 16th day of July, 1907, that the final decree in the first suit, in Virginia, of Roller vs. Murray, on which the Chesapeake-Western Company, suit was based, was entered the 24th day of June 1907, that an appeal was allowed in that cause, on the 3rd day of August 1907 and that the Court of Appeals of Virginia heard the appeal and decided the same, without any delay whatever, its decree being dated the 21st day of November 1907 and the decree of June 24th 1907 was thereby affirmed.

It further appears from the transcript of the record, That the cause of the Chesapeake-Western Company vs. John E. Roller et als. was heard on the 10th day of October, 1907, at a time when a decision upon the appeal pending in the Court of Appeals of Virginia, might be rendered at any moment; the record having been printed *that* the said cause was heard upon the said printed record, that record being the only evidence that was adduced, the printed record being used doubtless as being more convenient than a written transcript would be, and that at that time, to wit, the 10th day of October 1907, the decree of June 24th 1907 was in full force and

the presumption of the law was, that it was without error and yet it was held not to be res adjudicatta of the West Virginia suit, and was held to be no ground for enjoining the prosecution of the same.

It appears also, that the cause was heard upon the motion of the petitioner, John E. Roller, to dissolve that cause of the injunction order awarded therein, which enjoined and restrained him from prosecuting his suit in chancery, in West Virginia, upon the ground that the matters involved in said West Virginia suit were res adjudicatta, by the decree of the Virginia Court, of June 24th 1907 and that the only evidence adduced upon the hearing, was the printed copy of the record, just referred to, and that the injunction order was "vacated, set-aside and dissolved."

It appears also, most clearly, that the injunction was the only relief sought against the petitioner, Roller, by the bill of complaint.

It appears also, that, that injunction order was dissolved upon a motion made upon the bill of complaint and the exhibits filed therewith, no answer having ever been filed and according to the authorities, in such case, "the motion to dissolve is regarded as in the nature of a demurrer by which the defendant admits the truth of all the allegations relied upon, as a foundation for the injunction."

See "High on Injunctions" Sec. 1469 and the authorities there cited.

It is earnestly submitted further, that the Court did not decide that the injunction order was a mere temporary one and that while the appeal from the decree of June 24th, 1907, was pending, it was proper to dissolve the same and that it could be reinstated, in the event that the appeal was unsuccessful and the decree affirmed, or it would have said that, in that decree. It did decide that the *the* decree was res adjudicatta and decided nothing else. It is Impossible to believe that the court decided that the decree of June 24th 1907 was res adjudicata of the West Virginia case, yet that it would dissolve the injunction order until the appeal was decided and that then it could be re-instated, under such a decision, if the *the* docket of the Court of Appeals of Virginia had been behind, for any length of time the West Virginia case might have been pushed to a conclusion, adverse to the Chesapeake-Western Company, before the result of the Appeal was known and the injury with which the said Chesapeake-Western Company averred in its bill of injunction, that it was threatened, might have been speedily inflicted upon it; this too at a time, when the cause No. 1226, in the Virginia Court of Appeals had been presented and its early decision, which came in fact on the 21st day of November 1907, was surely contemplated and there could be no possible reason why the decision of the Court in the Chesapeake-Western Company case should not have awaited that decision also, if the court did not intend to hold and did not in fact decide, that it was not res adjudicata. Nor can it be understood why the said Chesapeake-Western Company did not, immediately after the decree of 21st of November 1907, affirming that of June 24th 1907, move the court, to re-instate that injunction order, if the decree dissolving the same was merely interlocutory and not

a decision upon the merits, instead of proposing to take an appeal from the decree, as it did do.

It appears also from the record, that the Complainant, the Chesapeake-Western Company itself, recognized the fact that this decree was upon its merits and a final decree, for upon its motion the operation of the decree was suspended for a period of sixty days from the date thereof, in order to permit the said Company to apply for an appeal, upon its giving the usual suspending bond.

It further and distinctly appears also, that the court itself, by its own decree in fact, held and decided that the cause had been heard upon its merits, for it expressly recognized the right of the Chesapeake-Western Company, the Complainant, to take an appeal and upon the motion of that Company, not only provided for such an appeal but allowed it sixty days within which time it might perfect such appeal, suspending the decree of dissolution for that period, provided that the said Company should give the usual suspending bond, the penalty of $500, conditioned according to law.

It further appears that no effort was ever made to re-instate the injunction, which had been dissolved by decree of Oct. 10th, 1907, but that the cause was set down for hearing in vacation on the other branch of the injunction, which had nothing whatever to do with that part of the decree, which enjoined the petitioner, Roller, from prosecuting his suit in the West Virginia Courts, and that it dissolved the second branch of the injunction order, and dismissed the cause without any reservation whatever.

The Law of the Case as to Such Matters.

(1) It is well settled that in cases "where the dissolution affects the merits of the cause" the right of appeal is acknowledged but where it does not affect the merits, it is denied"

See 1st Barton's Chan. Practice, 2nd Ed., page 505.

This is a statement of the law, by a Virginia author- of the same state in which that decree of October the 7th 1907 was rendered and must have been accepted as the law, by the Court. There can be no other conclusion.

See also "High on Injunctions" Sec. 1706 & '7.

In Sec. 1706 it is thus laid down, "In Illinois the doctrine is well "established that in cases where an injunction is the only relief "sought by the bill, and a motion to dissolve for want of equity "is sustained, by the court, the order of dissolution is such a final "order as entitles the plaintiff to a writ of error or an appeal there-"from. In such cases the motion to dissolve operates as demurrer "to the bill, for want of equity, and is considered as an admission of "the material allegations of the bill."

This has been the law, in Virginia, since April 1849: "Upon a "motion of the defendant to dissolve an injunction, before answer "of the de-ndant, all the allegations of the bill must be taken as "true."

See Peatross vs. McLaughlin, 6th Grattan, 74.

"The same rule applies when the injunction is the only relief "sought and the motion to dissolve is heard upon bill, answer and "affidavits: and in such case the dissolution of the injunction may "be treated as a final disposition of the cause."

See High on Injunctions, Sec. 1706.

In Sec. 1707, of High on Injunctions, it is declared,

"a distinction has been drawn between cases where a dissolution of "the injunction affects the merits, of the cause, involving a decision "upon the material questions in controversy and cases where the dis- "solution does not go to the merits, but affects simply collatteral "matters, or questions purely within the discretion of the Court, "the right of appeal being recognized in the former class of cases, "but denied in the latter."

In 2nd Encyclopedia of Pleading and Practice, page 124, it is declared, that,

"an order allowing an injunction must be judged by its effect, and "where the bill of complaint seeks no other relief than that relating "to the injunction, an order or decision made thereon is final and "appealable."

It was under these principles, that the Circuit Court of Rockingham county, State if Virginia allowed an appeal in the Chesapeake-Western case.

(2) Where the only relief sought by the bill of complaint was the injunction, a decree dissolving that injunction, on the merits, is final and res adjudicatta. The West Virginia Court itself has decided this. See Fluharty vs. Mills, 49th West Va., 446, where it was held;

"a decree dissolving an injunction on the merits, where no other "relief is sought, is final and res adjudicata."

See also Gallagher vs. Moundsville, 34 W. Va., 730, 12 S. E. 850, 26 Am. St. Rep., 942;

"an order dissolving an injunction based on the merits of the case, "where the only relief sought by the bill is such injunction, is as "regards finality, such as will sustain the defense of res adjudicata."

See 1st Barton's Chan. Practice, page 361.

(3) It is well settled also, that when such motion is heard not only upon the merits of the case, as presented by a demurrer to the bill, but upon a printed copy of the record in the cause, then pending in the Court of Appeals of Virginia,

"can only be re-heard for errors apparent on the face of the record, "or upon the ground of the discovery of new and important testi- "mony, not known or accessible before."

See 1st Barton's Chan. Prac. 2nd Ed., page 361.

Upon these authorities, it is submitted, that inasmuch as the *the* only relief sought in the cause aforesaid of the Chesapeake-Western

Company vs. John E. Roller et als., was the injunction to enjoin and restrain him from prosecuting his Chancery suit, in West Virginia, upon the grounds that the decree of June 24th 1907 had made the matters involved in that suit res adjudicata, and inasmuch as the motion to dissolve was heard upon the bill of complaint without answer and inasmuch also as it was heard upon a copy of the record in the Virginia Court of Appeals, in which that decree of June 24th 1907 was affirmed and finally inasmuch as the Comp-ainant, the Chesapeake-Western Company, treated the decree as a final one and the court itself construed it and held it to be; that decree was a decree upon the merits and could be nothing else and therefore was res adjudicatta of the same question, in the West Virginia case and should have been given "full force and credit" in the courts of that state, both in the Circuit Court of Pendleton County and by the Court of Appeals of that state and they erred in refusing so to do.

While it — said in the opinion of the West Virginia Court of Appeals that this was not a final decree because leave was reserved to the petitioner Roller, to plead, answer or demur to the bill of complaint, if he should be so advised and that if he prevailed, in the Appellate Court:

"he would have set up the reversal, by plea or answer and wholly "defeated the suit and the court gave him leave to do so",

it is manifest to the simplest mind that the reservation of such leave to the petitioner, Roller, to plead, answer, or demur was absolutely useless and vain, for he had defeated the complainant as to the only relief sought against him and had already and thereby wholly defeated the suit," so that this view of the Court of Appeals of West Virginia was and is a palpable error on its face and is really the cause of its erroneous conclusion, as to giving that decree full faith and credit.

The injunction to restrain the petitioner, Roller, from prosecuting his Chancery suit, in West Virginia, was the only relief sought against him, in the bill of complaint and the dissolution of that injunction was all the relief he wanted and wholly defeated the suit, as to him and his interests. Surely the West Virginia Court erred in holding that the decree of October 10th, 1907, was not a hearing on the merits and upon the record evidence adduced, in the cause, and upon the arguments of counsel and final forever as to the dissolution of the injunction, and that it did not determine that the decree of June 24th 1907 was not res adjudicata as to the West Virginia suit and it surely erred in not giving "full faith and credit" to that decision and that decree.

JOHN E. ROLLER,
In Propria Persona.

[Endorsed:] John E. Roller v. Mary H. Murray, &c. Supplement to the petition for writ of error.

JOHN E. ROLLER, Plaintiff,
vs.
MARY H. MURRAY et als.

Further Supplement to a Petition for Writ of Error in the Above-entitled Cause.

Whenever the plea that a judgment or decree of one State shall be given "full faith and credit" in a proceeding in another State and such "full faith and credit" is refused, some reason more or less plausible must be assigned for such refusal.

In the case presented in this petition the Supreme Court of the State of West Virginia, bases its refusal to give such full faith and credit to the decree of the Circuit Court of Rockingham County, Virginia, in the case of Chesapeake-Western Company vs. John E. Roller, and others because as it says the decree in said cause pleaded as a former adjudication, shows that the case was not finally ended, because in that decree leave was reserved the said petitioner Roller to plead answer or demur to the bill of complaint, at the next term, if he should be so advised and that if he had succeeded in his appeal to the Supreme Court of Virginia and obtained a reversal, he could have set it up by plea or answer and wholly defeated the suit.

The complete answer to this insufficient excuse for refusing to give "full faith and credit" to that decree in the Case of Chesapeake-Western Company vs. Roller, is found in the fact:

First. That the hearing at the time that decree was entered, was a hearing upon the merits; It was upon the bill, without answer or even demurrer and was heard upon a printed copy of the record No. 1226, of the Supreme Court of Virginia and was in fact not only a decree upon the merits but a final decree and one upon which an appeal could have been taken.

The decree shows on its face that the Complainant regarded it as a decree upon the merits and one upon which an appeal could be taken, for it shows that:

"And on motion of said Chesapeake-Western Company it is fur-
"ther ordered that the operation of this decree be suspended for a
"period of sixtty days from this date in order to permit the said Ches-
"apeake-Western Company to apply for an appeal therefrom; pro-
"vided, however, that said Company shall execute a bond before
"the Clerk of this Court in the sum of $500, conditioned according
"to law."

In 1st Barton's Chancery Practice II Edition, page 505 it is said:

"It is well settled that in cases 'where the dissolution affects the
"merits of the cause' the right of appeal is acknowledged but where
"it does not affect the merits, it is denied."

In High on Injunctions, Sec. 1706 & '7, it is said:

"In Illinois the doctrine is well established that in cases where
"an injunction is the only relief sought by the bill, and a motion to
"dissolve for want of equity is sustained, by the Court, the order of
"dissolution is such a final order as entitles the plaintiff to a writ

" of error or an appeal therefrom. In such cases the motion to dis-
" solve operates as a demurrer to the bill for want of equity, and is
" considered as an admission of the material allegations of the bill".

" This has been the law in Virginia, since 1849: Upon a motion
" of the defendant to dissolve an injunction, before answer of the
" defendant, all the allegations of the bill must be taken as true."

See Peatross vs. McLaughlin, 6th Grattan, 74.

See further authorities cited, on pages 39 & 40 of the printed petition, for the Writ of Error.

As was said by the Supreme Court of Appeals of Virginia, the question is,

" What is the effect of the decree, dissolving an injunction, upon a
" mere bill, before any answer. In such case all the allegations of
" the bill are taken to be true."

Moreover,

" In Virginia which is the State in which the decree dissolving
" the injunction was rendered, the rule as to res adjudicata and as to
" 'full faith and credit' is much more severe than in many States."

(1*a*) "A judgment or decree rendered in a former suit is con-
" clusive between the parties as to all matters presented and litigated
" therein and as to all which might have been litigated and deter-
" mined".

(2*a*) "A judgment of a court of competent jurisdiction upon a
"question directly involved is conclusive as to that question, in an-
" other suit between the same parties in all matters presented or pre-
sentable or concluded by the judgment in the former suit."

Legrand vs. Rixey, 83 Va. 862.

(3*a*) " The doctrine of res adjudicata embraces, not only what was
" in point of fact adjudicated, but the judgment or decree is conclu-
" sive as to all the matter in issue, whether formerly litigated or not.
" Every point which was specifically decided and every issue which
" must have been decided to support the decree is concluded".

(4*a*) "Former adjudication applies not only to matters adjudi-
" cated, but to every point which properly belongs to the subject of
" litigation or which the parties exercising reasonable diligence,
" might have brought forward."

See Miller v. Smith, 109 Va. 651.

Indeed this is the rule in the State of West Virginia also.

" An adjudication by a court having jurisdiction of the subject
" matter and the parties is final and *and* conclusive, not only as to
"the matters actually determined, but as to every other matter which
" the parties might have litagated as incident thereto and coming
" within the legitam-te purview of the subject matter of the action.
" It is not essential that the *the* matter should have been formally
" put in issue in a former suit, but it is sufficient that the status of
" the suit was such that the parties might have had the matter dis-
" posed of on its merits. An erroneous ruling of the Court will not
" prevent the matter from being res adpudicata. (1890) Sayre's
Admr. v. Harpold, 33, W. Va. 553, 11 S. E. 16; (1892) Rogers &
Rogers, 37 W. Va. 407, 16 S. E. 633.

"An adjudication by a court having jurisdiction of the subject-"matter and the parties is conclusive not only as to the matters ac-"tually determined, but as to every other matter which the parties "might have litigated in connection therewith".

Cresap v. Cresap, 54 West Va., 581, 46 S. E. 582.

Second. In the further fact, that it is conclusively settled "that "the same effect is to be given to the record in the Courts of the State "where produced as in the Courts of the State from which it is "taken".

See 6th Enc. of U. S. S. C. Rep. p. 346 and the cases there cited.

Embrey v. Palmer, 107 U. S. p. 3.

Third. "Not only are these the views as to the finality of that *the* decree, under all of the authorities cited above and many others, but they are confirmed by the view which the Circuit Court of Rockingham County—the Virginia Court—took of that decree, in that it did not re-instate the injunction but made a final decree in the cause, on the 1st day of August 1908, dissolving the other branch of the injunction, in the cause and ending the whole cause, by a final decree.

It will be observed that in Staley v. Big Sandy & E. L. G. R. R. R. Co., It is said:

"We observe, therefore, that, since there can be reinstatement of "an injunction dissolved on bill and answer, at any time during fur-"ther progress of the cause, or at the hearing on the merits, there is "no finality in the dissolution order of Oct. 6th 1903. It is finality "of the suit that bars, not mere dissolution of the injunction, re-"taining the cause for further hearing. All this is consistent with "the decisions of this court.

"Dismissal without prejudice such as we find here merely prevents operation of the decree as a bar to a new suit, leaving the same rights of prosecution and defense as if the suit was first instituted".

And the Court expressly declares that "the contention is that the "decree dissolving the first injunction was a final adjudication of "the right to enjoin. We say it would have been such if the final "decree in that cause entered on the merits, had been made so as to "to be final, as is usual in disposing of a cause on its merits".

It is manifest that the Supreme Court of Appeals of West Virginia, ignored or overlooked the fact that the cause was forever ended by a final decree and that the decree dissolving the injunctions, restrained the petitioner, Roller, from prosecuting his case in West Virginia, in the Circuit Court of Pendleton County, was also finally determined; by a hearing upon the merits and by a final and irreversible decree, in the cause.

Even if the view of the Supreme Court of Appeals of West Virginia, is only possible erroneous, your petitioner should be allowed a writ of error, and be allowed a day in Court, to make good by argument, upon reason and the authorities, his claim, that the decree

of the West Virginia Court of Appeals was erroneous, in refusing to give "full faith and credit" to that decree as an adjudication upon the merits.

Are not the reasonings and conclusion of the West Virginia Court erroneous on their very face?

The injunction order was not a mere preliminary injunction, but was an injunction sought for upon the sole and complete allegations of the Bill and if entitled to be maintained upon the truth of the allegations, made in the Bill of Injunction, it was entitled to remain in full force, until the cause reached a final hearing and a final decree.

The facts being undisputed, the law of the case alone was to be adjudicated and settled. It was so adjudicated, upon the allegations of the bill of injunction taken to be absolutely true.

It could not be reinstated until the decree of dissolution was set aside and that could only be accomplished by an appeal to the Court of Appeals of Virginia. The Court so regarded it—the parties so regarded it.

The West Virginia Court held, that the petitioner, Roller still had something to do to defeat the suit, because of the provision in the decree, which allowed him to plead answer or demur, at the next term of the court, when he had already defeated the injunction order and had gotten all the relief he could ask for and the plaintiff had lost his right to a rehearing of the decree, except in the Appellate Court.

If the motion to dissolve had been overruled the case would have been wholly different for then, the defendant before he could even take an appeal, would have had to show that the cause had been heard upon the merits and the principles of the cause adjudicated.

See 4 Minor's Institutes, 2nd. Ed. page 959 and the numerous cases there cited.

But it was dissolved, and upon the merits. If not dissolved upon the merits, upon what ground was it dissolved?

Fourth. But the final and absolutely controlling consideration as to the finality of this decree and as to its not being an interlocutory decree *it* is found in the language of the Statute of Virginia, upon the subject.

See Sec. 3446 of the Code of Virginia, Ed. of 1887.

"Where an injunction is wholly dissolved, the bill shall stand "dismissed of course with costs, unless sufficient cause be shown "against such dismission at the next term of the Court after the dis-"solution. The Clerk of the court shall enter such dismission on "the last day of said term".

So that from the date of the decree of the 10th of October 1907, dissolving the injunction order of 16th day of July, 1907, and not only dissolving it, but decreeing that the same should be

"vacated, set aside and dissolved"

the bill stood dismissed, unless cause sufficient was shown against it at the next term of the court".

So that the ruling of the Supreme Court of Appeals of West Virginia, in holding that the decree dissolving this injunction was wholly interlocutory, is an error, too plain to be gainsaid.

It is submitted that the justice of the case demands that this petition should receive the utmost possible consideration, at the hands of the Court, since it is upon very harsh principles of the law of champerty which the Supreme Court of Appeals itself says—in its opinion are not recognized as the law in the State of West Virginia.

JOHN E. ROLLER,
In Propria Persona.

[Endorsed:] John E. Roller vs. Mary H. Murray et als. Further supplement to petition for Writ of Error. February 17, 1914. Allowed in giving bond in $500 to satisfaction of the Court. Oliver W. Holmes, Justice Supreme Court of U. S.

Know all men by these presents, that we, John E. Roller, as principal, and American Surety Company of New York, a corporation, as surety, are held and firmly bound unto Mary H. Murray, Holmes Conrad, Trustee, George A. Wheelock, Chesapeake-Western Company, The Pocahontas Company, and the Bowling Green Trust Company, in the full and just sum of Five Hundred dollars, to be paid to the said Mary H. Murray, Holmes Conrad, Trustee, George A. Wheelock, Chesapeake-Western Company, The Pocahontas Company, and The Bowling Green Trust Company, their certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 18th day of February, in the year of our Lord one thousand nine hundred and fourteen.

Whereas, lately at a term of the Supreme Court of Appeals of the State of West Virginia, in a suit depending in said Court, between John E. Roller, appellant, and Mary H. Murray, Holmes Conrad, Trustee, George A. Wheelock, Chesapeake-Western Company, The Pocahontas Company, and The Bowling Green Trust Company, appellees, a judgment was rendered against the said John E. Roller and the said John E. Roller having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Mary H. Murray, Holmes Conrad, Trustee, George A. Wheelock, Chesapeake-Western Company, The Pocahontas Company, and The Bowling Green Trust Company, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said John E. Roller shall prosecute said writ to effect and answer all

damages and costs if he fail to make his plea good, then the above obligation to be void else to remain in full force and virtue.

JOHN E. ROLLER. [SEAL.]
AMERICAN SURETY COMPANY OF NEW YORK,
By A. NYE, [SEAL.]
Resident Vice-President.

Sealed and delivered in presence of—

WILLIAM E. LINDEN.
DAMRON G. TYREE.
W. CARRICK.

[SEAL.]

Attest:

CLAUDE B. BROWN, [SEAL.]
Resident Assistant Secretary.

Approved by—

OLIVER WENDELL HOLMES,
Associate Justice of the Supreme Court of the United States.

STATE OF WEST VIRGINIA, *To wit:*

I, Wm. B. Mathews, Clerk of the Supreme Court of Appeals of West Virginia, do certify that the foregoing is a true copy of a bond lodged in my office with the writ of error from the Supreme Court of the United States therein mentioned, which bond and a copy of which writ remain on file in my office.

In testimony whereof I hereunto set my hand and affix the seal of said Supreme Court of Appeals of West Virginia, this 17th day of March, 1914, and in the 51st year of the State.

[Seal Supreme Court of Appeals, West Virginia.]

WM. B. MATHEWS,
Clerk Supreme Court of Appeals.

VIRGINIA:

At a Circuit Court in Chancery for Rockingham County, July Term, August 1st, 1908.

In Chancery.

CHESAPEAKE-WESTERN COMPANY
vs.
JOHN E. ROLLER, etc.

This cause came on to be heard this 27th day of June, 1908, upon the papers heretofore read and proceedings had, upon demurrer and answer of Mary H. Murray, now filed by leave of Court, and upon motion of Mary H. Murray to dissolve the injunction contained in the second clause of the injunction order and was argued by counsel.

Upon consideration whereof, and the Court desiring time to consider the said motion, by consent of parties, it is ordered and decreed that said cause may be determined by the Court in vacation and such order entered, as the court may seem proper. The order which is entered, to have the same force and effect as if entered in term—

Consented to—

D. O. DECHERT,
Att'y for Compl't.
CONRAD & CONRAD,
Att'ys for Mrs. Murray.

CHESAPEAKE-WESTERN COMPANY
vs.
JOHN E. ROLLER.

Demurrer of Mrs. Murray.

The defendant, Mary H. Murray demurs to the said bill and says that the same is not sufficient in law or equity, and for special grounds of demurrer avers:

(1) The Complainant has an adequate remedy at law for any damage it may sustain by reason of the allegations of the bill.

(2) The bill does not allege such grounds for the interposition of a court of equity as are necessary to justify the court in sustaining an injunction.

(3) By the admissions of the bill, the Complainant owes the demurrant over $100,000, while the debt alleged as asserted by John E. Roller is stated at $24,000, so that there is still due from the Complainant as appears by the bill about four times as much as would be necessary to discharge the debt alleges to be asserted by said Roller, even if the said Roller should succeed in his pretensions.

(4) It does not appear from the bill that the Complainant would suffer an irreparable loss nor such loss as could not be made good by the Complainant out of the money in its hands and due to demurrant outside of the amount on deposit in the First National Bank of Harrisonburg.

(5) It does not appear from the allegations of the bill that there are well grounded pretensions of immediate injury nor any emergency or danger of loss, requiring immediate action or interposition of the Court to warrant the interference by injunction.

(6) It does not appear from the bill that there has been any breach of the covenant of warranty contained in the deed of the demurrant, to the Complainant, which was only a covenant of general warranty, nor that there is any immediate danger of a breach of warranty, and that the Complainant is without adequate remedy without the interposition of a court of equity by the injunction.

Wherefore she prays, &c.

HOLMES CONRAD AND
CONRAD & CONRAD,
MARY H. MURRAY,
By Counsel.

Filed June 27th 1908.
(Signed) D. H. LEE MARTZ, *Clerk.*

The Separate Answer of Mary H. Murray to a Bill in Chancery Filed in the Circuit Court of Rockingham County, Virginia, Against Herself and Others by the Chesapeake-Western Company and Therein Pending in the Name and Style of Chesapeake-Western Company vs. John E. Roller, &c.

This respondent not waiving her right of demurrer or any exception which can or may be had or taken to said bill, proceedings, to answer so far as she is advised it is necessary for her, answering say-:

(1) It is true that by deed of January 29th 1901, respondent and her husband, Henry M. Murray, now deceased, and Holmes, Conrad, Trustee, and George A. Wheelock conveyed to the said Complainant, *Complainant,* the tract of land in the bill mentioned, conveyance being with the covenant of general warranty only.

(2) It is true that the Complainant paid $15,000, cash and agreed to pay $111,000.00, in three equal payments, of $37,000.00 each, due eighteen, thirty and forty-two months respectively from January 29th 1901, as the purchase price and the deferred payments were secured, by deed of trust, to Holmes Conrad, Trustee.

(3) It is also true that respondent entered in to an agreement with the complainant and the Pocahontas Company, September 29th, 1904, which was modified by another instrument in writing of date January 9th 1905, by which it was agreed by the said complainant and the Pocahontas Company that they would pay her not less than $6,000, semi-annually to be applied on the deferred pay-

ments, paying first the interest on the whole amount due and the excess of the payments to be credited on the principal, but it was also agreed that they would pay the whole proceeds of the lumber, rail road ties, bark &c., taken from the land at the end of each month. And it is true that under the orders of this Court in the cause of Roller vs. Wheelock a certain amount was paid into the First National Bank of Harrisonburg, to the credit of said cause and subject to the future orders of the Court, but whether the amount stated in the bill is a correct amount, respondent is not prepared to say. Respondent however, denies that the amount due on the purchase money "is not now due" as respondent is advised that the terms upon which an extension of time was granted to the complainant have not been kept and performed, but have been violated and disregarded by the said complainant and Pocahontas Company.

Respondent says that she further believes it is true that there is due from the Complainant, over $100,000, to her on account of the purchase money as alleged in the bill.

(4) It is true that John E. Roller did institute and prosecute a suit in the Circuit Court of Rockingham County, Virginia, against respondent and others in the name and style of Roller vs. Wheelock &c., and that said suit was finally disposed of and the cause dismissed.

(5) It is true that said Roller did institute another suit in Rockingham County for the cause of action and seeking the same relief. To that bill, respondent has filed pleas of res-adjudicata and the statute of limitations and the same is still pending and undetermined.

(6) It is true that said Roller also instituted a suit in West Virginia, involving the same subject matter, setting up the same cause of action, substancially the same facts, making the same parties defendants, and involving the same issues which were involved in the suit which has been decided against him by this Court and affirmed by the Supreme Court of the State.

To the said bill in West Virginia, respondent has filed demurrers and pleas there and hopes to have that suit dismissed also.

(7) Respondent believes it is true that this Court has the right to enjoin and restrain said Roller from prosecuting said suit in West Virginia, And that the injunction as to that suit should be perpetuated, but she is advised that by an order entered in this cause the injunction in that respect has been dissolved.

(8) Respondent denies that the Complainant is a stake-holder, as to the unpaid purchase money due respondent, and denies that the Complainant has any right to implead parties as alleged in said bill. As to the money which has been paid into the Bank, aforesaid, the Complainant has no interest, the same having been paid into the hands of the Court under an order which fully protects the said complainant, and the complainant is entitled to credit on the purchase money due respondent applying the proceeds first, to the payment of interest on the whole amount due her and then to the principal as soon as it is paid over to her.

(9) Respondent denies that she is without property other than

her interest in the proceeds of the sale of this land, and that in the event of Roller's recovery against her, if such event should ever occur, and that the land sold complainant by the respondent would have to be held liable for anything more than what would be due to respondent at the time of the recovery by the said Roller.

Whatever calaim the said Roller may succeed in establishing, if any, would be a personal debt against respondent, and it would not effect the rights of the Complainant under the conveyance to the Complainant aforesaid.

(10) Respondent denies that there is any danger of the complainant's eviction from the land, or that it is entitled to have any part of the purchase money which has been paid by it, refunded or that it has any thing to do with the fund in the Bank aforesaid, or any right to restrain the Bank from paying over the money under orders of this Court.

(11) Respondent further says that the Complainant can be amply protected by paying what it owes into the hands of the Court to be paid under ordrees of the Court, if the Court should deem that necessary for its protection, but she is informed and so charges that there exists no such circumstances nor conditions nor threatened dangers which entitles the complainant to the relief sought in the bill.

(12) Respondent denies every substancial allegation not herein admitted to be true and calls for strict proof, and denies that said complainant has any right in law or equity to prevent the paying over to the respondent of the money now on deposit in the First National Bank of Harrisonburg, as aforesaid, or to withhold from respondent the payment of the purchase money due by complainant to respondent.

Now having answered as fully as she is advised it is necessary she prays to be hence dismissed etc.

MARY H. MURRAY,
By Counsel.

HOLMES CONRAD AND
CONRAD & CONRAD,
For Respondent.

CHESAPEAKE-WESTERN COMPANY
vs.
JOHN E. ROLLER, &c.

This cause having been submitted at the last term of this — for decision in vacation an order to be entered to have the same effect as if entered in term and no order having been entered, it is now ordered and decreed that the order for vacation decree be, and the same is set aside. And the cause now coming on to be heard on the papers heretofore read, and the proceedings had upon the demurrer and answer of Mrs. Mary H. Murray and on her motion to dissolve the second clause of the injunction order and was argued by counsel.

On consideration whereof, the Court doth this 1st day of August 1908, adjudge order and decree that the second clause of the injunction awarded in the cause, on the 16th day of July, 1907, enjoining and restraining the First National Bank of Harrisonburg, Virginia, from paying and Conrad & Conrad and Mary H. Murray from receiving the fund of about $18,00.00, now on deposit in said Bank, in within bill mentioned, be and the same is hereby dissolved.

It is further ordered and decreed, that the defendant, Mrs. Mary H. Mureay, recover against the Complainant, Chesapeake-Western Company, her costs in this suit expended and execution is directed to issue for the same and this cause is retired from the docket.

A Copy, Teste, of all the proceedings in the above named cause of the Chesapeake-Western Company vs. John E. Roller, et als., Since Oct. 10th 1907, to Final Decree of Aug. 1st, 1908.

D. H. LEE MARTZ, *Clerk*.

[Endorsed:] In the Circuit Court of Rockingham County, Virginia. Chesapeake Western Co. — John E. Roller. Transcript to Final Decree Aug. 1, 1908.

In the Supreme Court of Appeals of West Virginia.

JOHN E. ROLLER, Plaintiff Below, Appellant,

vs.

MARY H. MURRAY et als., Defendants Below, Appellees.

It is hereby stipulated by counsel for John E. Roller, Appellant, and Mary H. Murray and Holmes Conrad, Trustee, Appellees, parties in the above cause, that the Clerk, in making up the transcript for the Supreme Court of the United States, may forward as part of the record, without transcribing it, the printed copy of the record of the proceedings in the Circuit Court of Rockingham and the Supreme Court of Appeals of Virginia, in the case of John E. Roller vs. Mary H. Murray et als., being Record No. 1226 of the Supreme Court of Appeals of Virginia, including the opinion of the said Supreme Court of Appeals of Virginia, all of which were filed with the defendant Mary H. Murray's plea of res judicata in the Circuit Court of Pendleton County, West Virginia, and the same to be treated as a part of this record as fully as if copied therein.

And he shall also copy in the record the final decree of the Circuit Court of Rockingham County, Va., in the chancery cause of Chesapeake-Western Company vs. John E. Roller and others, of date August 1, 1908, certified by the Clerk of the Circuit Court of Rockingham County, Va.

Both of which, the said record and opinion of the Supreme Court of Appeals of Virginia, and the final decree in the case of Chesapeake-Western Company vs. John E. Roller and others, were part

of the record before the Supreme Court of Appeals of West Virginia at the hearing of this cause.

Dated at Harrisonburg, Va., March 6, 1914.

(Signed) JOHN E. ROLLER,
" *In Propria Personæ.*
CONRAD & CONRAD,
Of Counsel for Mrs. Mary H. Murray and Holmes Conrad, Trustee.

(Copy.)

STATE OF WEST VIRGINIA:

Be it remembered that heretofore, to-wit: At a Supreme Court of Appeals of the State of West Virginia, continued and held at Charleston, in said State, on Tuesday, November 29, 1910, the following order was made and entered of record, to-wit:

JOHN E. ROLLER
vs.
MARY H. MURRAY et als.

This day came John E. Roller, by Sipe & Harris, his attorneys, and presented to the Court a petition praying for an appeal from a decree of the Circuit Court of Pendleton County, pronounced on the 26th day of July, 1910, in a cause in which said petitioner was plaintiff and Mary H. Murray and others were defendants, with a transcript of the record of the decree aforesaid accompanying the petition, which being seen and inspected by the Court, the appeal prayed for is allowed, but the same is not to take effect until the petitioner, or some person or persons for him, shall have given before the Clerk of the Circuit Court of Pendleton County bond with good personal security in the penalty of Five Hundred Dollars, conditioned according to law.

At another day, to-wit: At a Supreme Court of Appeals, continued and held at Wheeling, in said State, on the 15th day of June, 1911, the following order was made and entered, to-wit:

JOHN E. ROLLER, Plaintiff Below, Appellant,
vs.
MARY H. MURRAY et als., Defendants Below, Appellees.

Upon an Appeal from a Decree of the Circuit Court of Pendleton County, Pronounced on the 26th Day of July, 1910.

This day came the appellant, by O. B. Roller and John E. Roller, his attorneys, and the appellees, by Edward S. Conrad and Holmes Conrad, their attorneys, and this cause was fully heard upon the transcript of the record of the decree aforesaid and the arguments of counsel thereon, and is submitted for decision.

At another day, to-wit: At a Supreme Court of Appeals, continued and held at Charleston, in said State, on 22nd day of October, 1912, the following order was made and entered, to-wit:

JOHN E. ROLLER, Plaintiff Below, Appellant,
vs.
MARY H. MURRAY et als., Defendants Below, Appellees.

Upon an Appeal from a Decree of the Circuit Court of Pendleton County, Pronounced on the 26th Day of July, 1910.

The Court, having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel thereon, is of opinion, for reasons stated in writing and filed with the record, that there is no error in said decree. It is therefore adjudged, ordered and decreed that the decree of the Circuit Court of Pendleton County, pronounced in this cause on the 26th day of July, 1910, be and the same is hereby affirmed, and that the appellant do pay to the appellees thirty dollars damages and their costs about their defense in this Court in this behalf expended: all of which is ordered to be certified to the Circuit Court of Pendleton County.

The decision of points in the foregoing cause, as the same appears from the syllabus and written opinion prepared by Judge Poffenbarger, was concurred in by Judges Brannon, Miller, Robinson and Williams.

The opinion referred to in the foregoing final decree is in the words and figures as follows:

Pendleton County.

ROLLER
v.
MURRAY et als.

Affirmed.

POFFENBARGER, *Judge:*

1. A decision of a court of a state of the Union, founded upon a law local or peculiar to that state, is entitled, by virtue of section 1 of Article IV of the Constitution of the United States and the Act of Congress, passed May 26, 1790, to full faith and credit in the courts of another state, in which such local or peculiar law is not recognised.

2. A right, question or fact, decided in a proceeding quasi in rem and in personam, is res adjudicata in a subsequent suit between the same parties, to charge or recover property, not involved in the former suit, if the subsequent suit involves the same right, question or fact.

3. An adjudication which precludes re-litigation of a question in the state in which it took place may be pleaded in bar in a subsequent suit in another state between the same parties and in which the same matter is involved and decisive of the issue.

4. Rejection of an amendment to a bill in equity on account of immateriality and delay in tendering it ample opportunity for an earlier tender thereof having been allowed, and the materiality thereof being doubtful, does not amount to denial of due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

5. Dissolution of a provisional injunction, before final disposition of the cause, is presumptively not an adjudication upon the merits, and is not conclusive of any question affecting the merits in subsequent proceedings in the suit or another suit, involving the same cause of action, unless it appears that the court founded the order of dissolution upon the decision of such a question.

POFFENBARGER, *Judge:*

The initial question in this cause is, whether a decree of a court of one state of the Union, declaring a contract void or unenforcible, because, under the law of its state, it is champertous, is entitled to full faith and credit, by virtue of section 1 of Article IV of the federal Constitution and the Act of Congress of May 26, 1790, in another state in which the contract, unaffected by the decision, is valid. In Roller v. Murray, 107 Va. 527, the contract here involved was declared champertous and enforcement thereof refused. That decision has been invoked here by a plea in bar. For the purposes of the present inquiry, the validity of the contract under the law of this state, viewed independently of the Virginia decision, will be assumed.

The constitutional provision referred to says "Full faith and credit shall be given in each state to the Public Acts, Records, and judicial proceedings of every other state. And Congress may by general laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." An Act of Congress, passed May 26, 1790, in the exercise of the power so conferred upon that body, prescribed the mode of authenticating records and judicial proceedings and then declared, "and the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every other court within the United States as they have by law or usage in the courts of the state from which they are taken." Rev. Stat. (U. S.) sec. 905. The decisions of the federal Supreme Court, construing these provisions and determining their scope and effect, as a general rule, adhere to their letter. The instances in which judgments and decrees are denied, in sister states, the force and effect they have in the states in which they were rendered, are rare. What sometimes seem to be exceptions are not really so. A judgment or decree which the court had no jurisdiction to pronounce may be impeached both at home and abroad. A ground of equitable relief against a judgment is available in the state in which it is rendered as well as in other states. So that, in these instances, the judgment has the same effect in a sister state as it has in the state in which it was rendered. A judgment which does not go to the merits of a claim, merely denies the remedy, as in the case of the statute of limitations, is not always conclusive in a sister state, for the reason

that it does not reach the merits of the claim in controversy. Bank v. Donally, 8 Pet. 361; Brent v. Bank, 10 Pet. 547; Stockyards v. Railroad Co., 118 Fed. 113, 63 L. R. A. 213. It affects only the remedy in the state of its rendition, leaving the validity of the claim unimpaired; and, since it does not extend to the merits in the home state, it cannot do so in another state. It has no greater effect in other states than it has at home.

A real exception is found in the case of judgments in favor of the state for penalties, inflicted as punishment for crimes and misdemeanors. "This court has no original jurisdiction of an action by a state upon a judgment recovered by it in one of its own courts against a citizen or a corporation of another state for a pecuniary penalty for a violation of municipal law." Wisconsin v. Pelican Ins. Co., 127 U. S. 365. In the opinion in that case, Mr. Justice Gray gives an elaborate and exhaustive exposition of the purpose of the constitutional and statutory provisions here involved and shows that judgments for such penalties are not within their spirit. Another sort of penalty, however, constitutes ground for such exception. To constitute an exception, the penalty must be one within the meaning of international law. In the subsequent case of Huntington v. Attrill, 146 U. S. 657, the distinction between such penalties and others is clearly marked and a judgment for a sum penal in its nature was upheld, because it was remedial rather than punitive in its nature. The court said: "In the municipal law of England and America, the words 'penal' and 'penalty' have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the state, for a crime or offence against its laws. * * * But they are also commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered. They are so elastic in meaning as even to be familiarly applied to cases of private contracts, wholly independent of statutes, as when we speak of the 'penal sum' or 'penalty' of a bond." The latter class of penalties are regarded as remedial. Tayloe v. Sandiford, 7 Wheat. 13; Hyde v. Cogan, 2 Doug. 699; Woodgate v. Knatchbull, 2 T. R. 148; Read v. Chelmsford, 16 Pick. 128, 132; Lake v. Smith, 1 Bos. & Pul. (N. R.) 174. In Huntington v. Attrill, the court said: "The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual."

Judgments for strict penalties are excepted because of their local nature. Their purpose is to enforce only the internal public policy of the state. The laws they enforce have no extra-territorial operation. Upon the same principle, judgments in rem ordinarily have no force or effect upon any property except that which lies within the limits of the state or country in which they were rendered. "Crimes are in their nature local, and the jurisdiction of crimes is local. And so as to the rights of real property, the subject being fixed and immovable. But personal injuries are of a transitory nature, and secuuntur forum rei. Rafael v. Verelst, 2 W. Bl. 1055, 1058. Crimes and offences against the laws of any State can only be defined,

prosecuted and pardoned by the sovereign authority of that State; and the authorities, legislative, executive or judicial, of other States take no action with regard to them, except by way of extradition, to surrender offenders to the State whose laws they have violated, and whose peace they have broken." Mr. Justice Gray in Huntington v. Attrill, 146 U. S. 657, 669.

As to the force and effect of judicial proceedings, the states of the Union sustain toward one another, by virtue of the full faith and credit clause of the Constitution and the statute made in execution thereof, a relation different from that of foreign countries. In other words, the judgments of sister states stand upon a higher plane than foreign judgments by reason of these provisions. Speaking of the former class, Woodruff, Judge, in de Brimont v. Penniman, 10 Blatch. 436, 439, said: "Those cases are not deemed to apply to the present, because the Constitution of the United States operates, as between the States, to give them an efficiency not due to a foreign judgment or decree." The constitutional provision itself by its terms excludes from operation among the states a considerable portion of private international law. It gives full faith and credit, not only to the judicial proceedings of every state, but also to its public acts and records. Hence, a law of one state, affecting the rights of persons and property and local in the sense that it differs from the laws of other states, and may be to some extent contrary to their policy, such as would not be recognized and enforced, nor a judgment carrying it into effect recognized, if it were the law of a foreign country, must nevertheless have full faith and credit in all of the states of the Union. The judgment upheld in Huntington v. Attrill, cited, was for a penalty imposed upon an individual by a statute of the state of New York, where it was recovered. A suit to enforce it was brought in the state of Maryland in which there was no such statute. The Maryland court refused to enforce it, but the federal Supreme Court held that, in so doing, it had denied the full faith, credit and effect to which the judgment was entitled under the constitution and laws of the United States. If a court of one state refuse to enforce the statute of another state in a case in which it ought to do so, a case in which the statute gives a right, it thereby denies such full faith and credit, because the statute is a public act of another state. Banholzer v. Insurance Co., 178 U. S. 402; Glenn v. Garth, 147 U. S. 360; Lloyd v. Mathews, 155 U. S. 222. "As between the States of this Union, the comity enjoined by private international law touching the effect to be given to foreign judgments is reinforced and supplemented by the clause in the federal constitution providing that full faith and credit shall be given in each State to the judicial proceedings of every other state, and by the act of Congress, made in pursuance thereof." Minor on Conflict of Laws, sec. 86, p. 188. Judgments in state courts are therefore clearly not open to all the defenses which can be made to foreign judgments. Hence, the adjudications as to the extra-territorial force and effect of such judgments cast practically no light upon the present inquiry. It is governed by the scope and framework of our constitutional system.

The important exceptions already noted contravene the letter of

the constitutional provision and are permitted to do so only because they are deemed not to be within its spirit. Subject to the restraint and limitations of the federal constitution, the states have all the sovereign powers of independent nations. These limitations were imposed for the accomplishment of certain purposes; and, to preserve harmony in the constitutional system, the limitations upon the powers of the states are themselves limited to a certain extent, or, rather certain things are deemed not to be within them. The exceptions from the operation of section 1 of Article IV include only such things as it was the plain purpose of the constitution to leave within the sole power and jurisdiction of the individual state. It was not contemplated that any state should surrender to another the power to determine what should constitute crimes and public offenses within its borders or the manner or extent of their punishment; nor that any state should say for another what should be sufficient to pass title to land or prescribe the mode of its alienation, descent or distribution, or by what means it should be subjected to the satisfaction of debts, or how questions of title should be litigated. It was upon considerations of this kind that the exceptions already noted were made. These, as well as the requirement that each state give full faith and credit to the public acts, records and judicial proceedings of every other state, seem to have had for their purpose, not the attainment of uniformity in laws, but rather the right of each state to have local and peculiar laws which all others should respect and enforce within certain limitations. To enable it to make and enforce such laws as it desires, each state is permitted to retain limited sovereign power. No other is allowed to interfere with its domestic or internal policy. To allow the courts of another to administer in any degree its criminal laws or determine questions of title would subject the policy of the state to outside interference. On the other hand, the full faith and credit clause and others compel each state to recognize and respect rights acquired by private individuals under the laws of other states, though such laws may differ from its own and vary from its policy.

The import of the decisions already analyzed and the general principles upon which they proceed afford no basis for the claim that the courts of this state may refuse to respect the decision of the Virginia court, because it is founded upon a law of Virginia which does not obtain in West Virginia. That law enters into the judicial proceedings set up here in resistance to this suit and as a bar to it. If it were an affirmative judgment of the Virginia court against the plaintiff here, based upon a statute, instead of the common law as understood in Virginia, it would be entitled to respect and full faith and credit, however different our law might be and even though it were contrary to the public policy of this state. The public acts or laws, records and judicial proceedings of a state are not susceptible of control or limitation by other states to the extent to which contracts are. A contract made in one state, to be performed in another, whose public policy it contravenes, need not be enforced by its courts; but the law of another state or judgment of its courts stands upon a higher footing.

This principle is well illustrated by the decision in Fauntleroy v. Lum, 210 U. S. 230, in which the decision of a Missouri court, allowing recovery upon a transaction in Mississippi, expressly prohibited by a statute of that state, was held to be entitled to full faith and credit in Mississippi, notwithstanding the prohibitory statute. Had the Missouri court properly construed and applied the Mississippi statute, the judgment would have been for the defendant, and, in accordance with the public policy and law of the state of Mississippi; but the federal Supreme Court nevertheless held that the Mississippi Supreme Court, in refusing to enforce it, had denied to it the force and effect to which it was entitled. Although this decision ppts it within the power of parties to nullify the statute of a state by invoking the jurisdiction of the courts of another state, the decision seems to accord with others, holding that an erroneous construction of a statute or other law of one state by the courts of another affords no ground for denying its judgment faith and credit.

Nor do we think this case falls within the class excepted on the ground that the decision is limited to the remedy and does not affect the merits. It was against the validity of the contract itself, asserted by the plaintiff and denied by the defendant. This was a vital element or issue in the case. In declaring the contract illegal or void, the court merely carried into effect a substantive law of the state. It was a court of general jurisdiction and the decision was not founded upon any limitation upon its powers. The distinction is marked in Provision Co. v. Provision Co., 191 U. S. 373, and Fauntleroy v. Lum, 210 U. S. 230. Some courts hold contracts affected by champerty merely illegal, while others declare them absolutely void. Page on Contracts sec. 345. In either case, the result is a consequence of the defect in the contract, not lack of power in the court to determine the character of the contract.

If the proceeding is to be regarded as having been one in personam, the foregoing principles and conclusions would necessarily and clearly make the plea in question good; but, if it was a proceeding in rem, having for its object the determination of a question of title to property or of funds, the inquiry goes further.

The allegations of the bills and their prayers for relief, regarded as seeking recovery of an interest in lands or as intended to charge certain lands in Virginia and not elsewhere, with the value of an interest therein, or to obtain a portion of a debt secured by a deed of trust upon such land, and not as seeking in any event or manner a personal decree against the defendant, may give the Virginia suit the character of a quasi proceeding in rem. Assuming them to have been such, and the purpose of the present suit to affect only lands in West Virginia, so that the lands to be affected are different, the causes of action are not wholly different, for they grow out of the same transaction and the basis of the right in each case is the same contract. In order to charge the Virginia lands, it was necessary to establish that contract. To charge the lands in this state, it is requisite to establish the same contract. The validity of that contract was directly in issue in the Virginia court between the persons who are parties to this suit and the question of its validity actually de-

cided. Had there been no appearance by the defendant in the former suit nor any service of process upon her, and the lands in that state had been subjected to sale or recovered in partial satisfaction of the plaintiff's demand, or his bill dismissed for some reason, there might not have been an adjudication of anything between the parties, binding them except as to the lands sold or recovered, as in the case of sales of property of non-residents under attachment proceedings when there has been no service of process or appearance. But there was an appearance and the validity of the contract, constituting the basis of the plaintiff's claim to the fund or to the land, was actually litigated between the parties and expressly decided against him. That decision obviously and necessarily settles and determines that question in the state of Virginia and precludes any subsequent trial of it there between the same parties in any other litigation in which it may be material, no matter what the form of action or character or measure of relief sought. Being *res adjudicata* in Virginia, it must be so in West Virginia, because the Virginia decision must have the same faith and credit in all other states that it is entitled to in that state.

"A right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified." Railroad Co. v. United States, 168 U. S. 1. See also New Orleans v. Bank, 167 U. S. 371; Davis v. Brown, 94 U. S. 423; Poole v. Dilworth, 26 W. Va. 583; Kingsport v. Rawson, 36 W. Va. 237; Wandling v. Straw et al., 25 W. Va. 692. "If a verdict be found on any issue or title, distinctly put in issue in an action of trespass, such verdict may be pleaded by way of estoppel in another action between the same parties or their privies in respect to the same fact or title." Outran v. Morewood, 3 East 125.

Escape from the effect of this decision is sought upon the theory of a lack of due process of law therein, founded upon the refusal of the trial court to permit an amendment. The offered amendment endeavored to eliminate the ground of the charge of champerty in the contract by showing that a fund had been provided for the payment of the expenses of litigation by the sale of a portion of the land, and that the agreement of the plaintiff to advance such expenses was made upon the faith of such existing fund, amply sufficient for the purpose. The said amendment was offered at a very late stage of the proceedings. The court based its rejection thereof upon two grounds, the delay in tendering it without excuse or explanation and its failure to show a contract materially different from that set up in the original and first and second amended bills. In disposing of the amendment, the court said "The bill had been amended twice already, and after these amendments, and after a thorough argument of the case on its merits, the court announced its decision. A due regard for the orderly procedure of the court

and the rights of the opposing party required that some limit be set to the privilege of amendments. The amendments now presented are offered without explanation or excuse, and in the main are unsubstantial, and would not change the opinion of the court on the merits of the case." Having said this, the court proceeded to analyze the amendments and show their lack of merit and insufficiency to bring about a different conclusion if they had been filed. The decision relied upon to sustain this contention is Hovey v. Elliott, 167 U. S. 409, asserting lack of due process in the entry of a decree for the plaintiff, after having stricken out the defendant's answer, because he was guilty of contempt in neglecting to pay into court a certain sum of money. This was a total denial of the right of defense, upon an insufficient ground. In that case, the action of the court was arbitrary and oppressive. Here, the plaintiff had been allowed a hearing. He had filed an original and two amended bills and had no doubt had opportunity to tender the third amended bill long before the submission of the cause. It is certainly competent for a court to say, within reasonable limits, what amounts to a compliance with its rules and the principles of law, respecting the order and limitations of proceedings in a case. Besides, in the opinion of the court, the proposed amendment would not have changed the character of the plaintiff's claim, nor relieved the contract of its infirmity. An erroneous decision in respect to either of these matters would not amount to a denial of due process of law. As to them, it is not a case in which the plaintiff has had no day in court.

It is also urged that the bills in this case make out one different in some respects from that presented in the Virginia court. However that may be, the vital question settled between these parties in the Virginia decision must be re-opened here in order to afford the plaintiff any relief. Mrs. Murray was his antagonist there as she is here. Wheelock and the Chesapeake-Western Company, standing in privity with her, were parties there as they are here, and all the substantial matters alleged in these bills were set up in the former suit.

The dissolution of an injunction against the prosecution of this suit, awarded by the Circuit Court of Rockingham County, Virginia, at the instance of the Chesapeake-Western Company, after that court had rendered the decision here pleaded in bar, is relied upon as a former adjudication in favor of the plaintiff, nullifying the effect of said decision. That was a preliminary injunction issued July 16, 1907, and dissolved on the motion of Gen. Roller October 10, 1907, without dismissal of the bill, and in the absence of any demurrer or answer thereto. The order of dissolution, giving Gen. Roller leave "to plead, answer or demur" to the bill at the next term, shows the case was not finally ended, and, by its recital that the cause was heard upon a printed copy of the record of the other cause in the Supreme Court of Appeals, reveals the status of the proceedings at the time. The decree in the first suit had been entered in May, 1907, and 90 days allowed for procurement of an appeal. An appeal and supersedeas, allowed not earlier than August, 1907, further suspended its operation. Under these circumstances, lack of ground

for a preliminary injunction, if a perpetual one should finally appear to be proper, was obvious. The trial court could not tell whether the decree in the other suit would be sustained or not, as it was under review in the appellate court. The award of an injunction as matter of final adjudication would be as efficacious as a provisional injunction perpetuated by final decree, in case of proof of ground for an injunction. Again there could be no irreparable injury, since the decision, if binding as res judicata, could be conclusively pleaded in this suit. Litigation would be lengthened rather than shortened by the injunction suit, which merely added another to the two already pending. Obviously, therefore, it was unnecessary to predicate the dissolution on the effect of the former decree, and the court did not in terms do so. The tenor of the order clearly indicates the contrary. Had Gen. Roller prevailed in the appellate court, as he no doubt expected to do, he would have set up the reversal by plea or answer and wholly defeated the suit, and the court gave him leave to do so. Our interpretation of the dissolution order negatives intent on the part of the court to declare the former decree not pleadable as an adjudication of the matters involved here.

There is no inflexible rule as to the effect of a dissolution of an injunction upon subsequent litigation between the parties. It depends upon the intention of the court, as disclosed by the state of the pleadings and terms of the order, unless the cause has been finally disposed of, and even then the dissolution may have resulted from lack of ground for the extraordinary writ, and not carry any implication of a determination of any question affecting the merits. Being interlocutory, the order of dissolution need not affect the merits. Presumptively it does not. Then to make it binding, should it not affirmatively appear to have been an adjudication upon the merits in terms or legal effect? Our decisions say so. Gallaher v. Moundsville, 34 W. Va. 730; Fluharty v. Mills, 49 W. Va. 446; Staley v. Railroad Co., 63 W. Va. 119. The record fails to show the decree or order of October 10, 1907, involved the merits, and also clearly indicates that it did not.

For the foregoing reasons, the decree complained of must be affirmed.

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of Appeals of the State of West Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Appeals, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between John E. Roller, appellant, and Mary H. Murray, Holmes Conrad, Trustee, George A. Wheelock, Chesapeake-Western Company, The Pocahontas Company, and The Bowling Green Trust Company, appellees, wherein was drawn in question

the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege, or immunity was claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said John E. Roller, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the nineteenth day of February, in the year of our Lord one thousand nine hundred and fourteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed by:

OLIVER WENDELL HOLMES,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States, October Term, 1913. John E. Roller vs. Mary H. Murray et al. Writ of Error. Filed Mar. 12, 1914. Wm. B. Mathews, Clerk Supreme Court of Appeals.

UNITED STATES OF AMERICA, *ss:*

To Mary H. Murray, Holmes Conrad, Trustee; George A. Wheelock, Chesapeake-Western Company, The Pocahontas Company, and The Bowling Green Trust Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of Appeals of the State of West Virginia, wherein John E. Roller is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judg-

ment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Oliver Wendell Holmes, Associate Justice of the Supreme Court of the United States, this nineteenth day of February, in the year of our Lord one thousand nine hundred and fourteen.

OLIVER WENDELL HOLMES,
Associate Justice of the Supreme Court of the United States.

On this 26th day of February, in the year of our Lord one thousand nine hundred and fourteen, personally appeared Herbert W. Wyant before me, the subscriber, J. E. L. Hughes, a notary public for the County of Rockingham, and State of Virginia, and makes oath that on the 23d of February, 1914, he delivered a true copy of the within citation to Conrad & Conrad, Att'ys of record for Mary H. Murray and Holmes Conrad, Trustee, and a true copy thereof to D. O. Dechert, Att'y of record for Chesapeake-Western Co and The Pocahontas Company, and that as he is informed and believes, George A. Wheelock and The Bowling Green Trust — are merely nominal parties and have no substantial interest in the cause.

HERBERT W. WYANT.

Sworn to and subscribed the 26" day of February, A. D. 1914.

[Seal of J. E. L. Hughes, Notary Public, Rockingham County, Va.]

J. E. L. HUGHES,
Notary Public.

"By the laws of Virginia, no tax is required upon this seal."

HARRISONBURG, VA., *Feb.* 23*rd*, 1914.

Service accepted of the within citation, for Mary H. Murray and Holmes Conrad, Trustee, to have the same effect as if served by the proper officer.

CONRAD & CONRAD, *Att'ys.*

HARRISONBURG, VA., *Feb.* 23*rd*, 1914.

Legal service of the within citation accepted and acknowledged for the Chesapeake-Western Company, The Pocahontas Company to have the same effect as if served by the proper officer.

CHESAPEAKE-WESTERN COMPANY,
THE POCAHONTAS COMPANY,
By D. O. DICHERT, *Att'y.*

Filed Mar. 12, 1914. Wm. B. Mathews, Clerk Supreme Court of Appeals.

STATE OF WEST VIRGINIA, *To wit:*

I, Wm. B. Mathews, Clerk of the Supreme Court of Appeals of the State of West Virginia, do hereby certify that the foregoing is a true copy and transcript of the record and filings in the cause of John E. Roller vs. Mary H. Murray et als., No. 1816, from the Circuit Court of Pendleton County, lately pending in said Supreme Court of Appeals; that the original of the foregoing copy of the stipulation of counsel as to the record in the Supreme Court of Appeals of the State of Virginia and the decree of the Circuit Court of Rockingham County, Virginia, was filed in my office on the 12th day of March, 1914; that the original bond of which the foregoing is a certified copy, with the original writ of error from the Supreme Court of the United States, therein mentioned, were lodged in my office on said 12th day of March, 1914, which bond and a copy of which writ remain on file in my said office.

In testimony whereof I hereunto set my hand and affix the seal of said Supreme Court of Appeals of West Virginia, this 17th day of March, 1914, and in the 51st year of the State.

[Seal Supreme Court of Appeals, West Virginia.]

WM. B. MATHEWS,
Clerk Supreme Court of Appeals.

STATE OF WEST VIRGINIA:

Office of the Clerk of the Supreme Court of Appeals of West Virginia.

In obedience to the command of the within writ of error, I, Wm. B. Mathews, Clerk of the Supreme Court of Appeals of West Virginia, herewith return said writ to the Supreme Court of the United States, together with a full and true copy of the record of the decrees entered and proceedings had in the said Supreme Court of Appeals and mentioned in said writ, and all things concerning the same, as the same lately were before the Judges of said Supreme Court of Appeals, and now remain of record or on file in my office; and with the petition for said writ and assignment of errors, citation and copy of bond.

In testimony whereof I hereunto set my hand and affix the seal of said Supreme Court of Appeals of West Virginia, this 17th day of March, 1914, and the 51st year of the State.

[Seal Supreme Court of Appeals, West Virginia.]

WM. B. MATHEWS,
Clerk Supreme Court of Appeals.

Taxation of Costs in the Supreme Court of Appeals of West Virginia.

JOHN E. ROLLER, Ap'l't,
vs.
MARY H. MURRAY et als., Ap'lees.

Affirmed October 22, 1912.

Appellees' Costs.

Clerk	$5.80
Printing Record	240.75
Clerk of Circuit Court for Transcript	114.00
Sheriff I. N. Ruddle, serving process	1.50
Total	$362.05

Appellees' Costs.

Clerk	$4.30
Damages, Code Chap. 135, Sec. 27	30.00
Attorney	30.00
Total	$64.30
Fee for transcript U. S. Supreme Court	$10.00

Attest:

WM. B. MATHEWS, *Clerk.*

[Endorsed:] No. 1816. To Circuit Court of Pendleton County. John E. Roller vs. Mary M. Murray et als. Mandate and Costs.

Endorsed on cover: File No. 24,117. West Virginia Supreme Court of Appeals. Term No. 966. John E. Roller, plaintiff in error, vs. Mary H. Murray; Holmes Conrad, Trustee, George A. Wheelock et al. Filed March 19th, 1914. File No. 24,117.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 966.

JOHN E. ROLLER, PLAINTIFF IN ERROR,

vs.

MARY H. MURRAY ET ALS.

MOTION TO DISMISS OR AFFIRM.

HOLMES CONRAD,
EDW'D S. CONRAD,
Counsel for Mary H. Murray,
One of the Defendants in Error.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 966.

JOHN E. ROLLER, PLAINTIFF IN ERROR,

vs.

MARY H. MURRAY ET ALS.

MOTION TO DISMISS OR AFFIRM.

Comes now Mary H. Murray, one of the defendants in error in the above-entitled cause, and moves to affirm the decree rendered by the Court of Appeals of West Virginia in said cause, or dismiss the writ of error taken from said decree, on the grounds—

1. That the writ of error was taken for delay only.

2. That the question on which jurisdiction depends is so frivolous as not to need further argument.

The transcript of the record of the cause has not yet been printed by the plaintiff in error, but enough of it is here presented as to allow the court to decide intelligently on the merits of the grounds on which this motion is placed.

1. *This Writ of Error is Taken for Delay Only.*

The appeal is from the final decree of the Circuit Court of Pendleton County, West Virginia, made on the 26th of July, 1910 (Appendix, page 35).

The case is here on three assignments of error to that decree. These are set out in the petition for appeal, page 12, and are in substance as follows:

1. That the court erred in holding that the plea of *res adjudicata* filed by defendant Mary H. Murray, in which she relied upon the decree of the Circuit Court of Rockingham County, Virginia, of the 24th June, 1907, affirmed by the Supreme Court of Appeals of Virginia on November 21, 1907, was a good and sufficient plea and defense to the demand of the petitioner Roller, set up in his bills of complaint in the West Virginia court.

2. That the court erred in refusing to hold that the court below had erred in refusing to decree that the plea of *res adjudicata* should not be entertained by that court upon the ground that the decrees in the Virginia courts presented in the said plea were void and of no effect, because they had denied to the petitioner Roller due process of law, in that they had denied to him the right to file the third amended bill of complaint tendered by him, and denied to him a hearing upon the case thereby presented, in which the petitioner Roller, as he averred, had made the statement of a case good in law against the defense of champerty set up in the Virginia courts, and in that particular the court had decided that there had been no denial of due process of law in the Virginia courts.

3. That the court erred in refusing to hold that the court below had erred in not sustaining the objections made by

petitioner Roller to the filing of the plea of *res adjudicata* as being well taken, the same being based upon the fact that in the cause of Chesapeake Western Co. *vs.* John E. Roller *et als.* it was held and decided, necessarily, by the decree entered in that cause that the matters involved in the cause in the West Virginia courts were not *res adjudicata* by the decrees rendered in the first cause of Roller *vs.* Murray, hereinbefore set forth.

The first cause of Roller *vs.* Murray, hereinbefore set forth, be it borne in mind, was the cause decided by the Virginia courts.

The language employed in the statement of these several assignments of error admits of improvement in lucidity of expression. The ideas sought to be conveyed are not, by that language, made strikingly apparent.

Let the three assignments of error be briefly considered.

The First Assignment.

This is that the Court of Appeals of West Virginia erred in holding that the plea of *res adjudicata,* "was a good and sufficient plea and defense to the demand of the petitioner Roller."

For grounds of this assignment it is urged—

1. That the decree of the Virginia courts was not final, because it reserved to Roller the right, should he be so advised, to institute other proceeding upon a *quantum meruit.*

2. That the causes of action in the Virginia court and those in the West Virginia court were not the same.

Assuming, for the sake of argument, that these grounds were sufficient, and that the court erred in overruling them, yet it is manifest that this court is without jurisdiction to correct these errors.

They present no Federal question, and none is presented or referred to. The only excuse for the claim that a Federal question is involved is that the West Virginia court gave faith and credit to the record of the Virginia court, from which it appeared that the suit in West Virginia was on the same cause of action and between the same parties as the suit in Virginia, in which the complaint of the appellee Roller had been dismissed.

This was a question merely of State practice and procedure and of general law, so far as the identity of the causes of action was involved. But as to the action of the West Virginia court in giving full faith and credit to the records of the Virginia court, there can be no doubt as to its duty to do what it did do.

The question whether a former judgment rendered against one is a bar to another action on the same cause of action is a question of general law only, and involves no Federal question.

San Francisco City vs. Itsell, 133 U. S., 65.

If the Virginia court, by denying leave to Roller to file a third amended bill, denied to him, as he insists, *due process of law,* he should have taken his appeal from the decree of that court. He cannot have an error of the Virginia court corrected by an appeal from the decree of the West Virginia court.

As to the Error Assigned in the Second Assignment.

This was that the Court of Appeals of West Virginia erred in not sustaining the objection of the complainant, Roller, to the filing of the plea of *res adjudicata,* on the ground that "the decrees of the Virginia court presented in the plea of *res adjudicata* were void and of no effect, because they denied to Roller due process of law, in that they denied to him the right to file a third amended bill of complaint," &c.

Assume that the Virginia court had erred in its decrees denying his motion to file a third amended bill, the remedy for the correction of such error was by appeal to the Court of Appeals of Virginia. He did appeal, and the court of appeals affirmed the decrees of the lower court. When these decrees were pleaded in bar of the proceeding in the courts of West Virginia was it possible for the courts of West Virginia to have rejected the plea of *res adjudicata* on that ground? Were they not bound to give full faith and credit to the records of the Virginia court?

Assume that the West Virginia Court of Appeals erred in its decision on that point. Has this court jurisdiction to correct such error, in a matter merely of general law or of State practice?

But, it seems, the Virginia court gave its reason for rejecting the third amended bill tendered by Mr. Roller, and that reason is recited in Mr. Roller's amended or supplemental petition for this appeal.

This third amended bill was tendered after the cause had been argued and submitted, and was in the hands of the court for decision. That court said:

> "Here the plaintiff had been allowed a hearing. He had filed an original and two amended bills, and had, no doubt, had an opportunity to tender the third amended bill long before the submission of the cause. It is certainly competent for a court to say, within reasonable limits, what amounts to a compliance with its rules and the principles of law respecting the order and limitations of proceedings in a cause. Besides, in the opinion of the court, the proposed amendment would not have changed the character of the plaintiff's claim nor relieved the contract of its infirmity. An erroneous decision in respect to either of these matters would not amount to a denial of due process of law. As to them it is not a case in which the plaintiff had no day in court."

It is true that if the Federal question of denying to the complainant the due process of law guaranteed to him by

the Federal Constitution had been duly raised by him and presented to the court for decision, the mere arbitrary denial by the court that such question was involved would not have deprived the complainant of his right to have such decision reviewed. But the reason given by the court for rejecting the third amended bill shows conclusively that the "due process of law" had not been denied to compiainant.

But the error assigned is not that the West Virginia court, from whose decree this appeal is taken, denied to complainant the due process of law, but that the *Virginia* court had, by refusing leave to file the third amended bill, so denied. But the action of the Virginia court is not before this court for review. As already said, if the Virginia court erred in its decrees the remedy was by appeal to the Court of Appeals. If that court by its decree had denied to complainant his constitutional right of "due process of law," such error might have been corrected by appeal to this court.

But, surely, the error of the Court of Appeals of Virginia cannot be corrected in this appeal from the decree of the Court of Appeals of West Virginia. The case of *Fauntleroy vs. Lum,* 210 U. S., 230, is instructive and conclusive on this point.

As to the Error Assigned in the Third Assignment.

This is but the same error assigned in the two previous assignments, with the qualification that the ground of the assignment is that the admission of the plea of *res adjudicata* is said to have been error, because it is

> "Based upon the fact that in the cause of Chesapeake Western Company *vs.* Roller *et als.* it was held and decided, necessarily, by the decree entered in that cause that the matters involved in the cause in the West Virginia courts were not *res adjudicata* by the decrees rendered in the first cause of Roller *vs.* Murray, hereinbefore set forth."

The answer to this assignment, then, is, (1) That what was decided in the case of Chesapeake Western Company *vs.* Roller, by the Virginia court, is not before this court for review. (2) The Chesapeake Western case was not between the same parties as are here in this case. (3) The reasons and conclusions rached by the Virginia court in that case have no pertinency or application to this case.

All the objections made to the two previous assignments of error apply equally to this assignment.

As to All Three Assignments of Error.

Generally only those errors which are assigned specifically as grounds of complaint and by reasons of which an appeal is prayed and a reversal asked can be considered by the court. The appellee has the right to be apprised by specific assignment of the alleged errors for which the decree complained of is sought to be reversed and to which he may intelligently address his reply.

In neither of these three assignments of error is any Federal question referred to; no violation of any right or immunity secured to the appellant under the Federal Constitution, laws, or treaties complained of or pointed out.

"The assignments of error are so frivolous" and it is so apparent that this appeal is taken for delay only that the motion to affirm should be granted.

Blythe *vs.* Hinckley, 180 U. S., 338.
Equitable Life As. Society *vs.* Brown, 187 U. S., 311.

The original bill filed in the Virginia court was for the enforcement of a contract made in Virginia. The court held that the contract was champertous, and hence void (Peck *vs.* Heurich, 167 U. S., 624), and dismissed the bill.

On appeal the Court of Appeals of Virginia affirmed this decree.

Part of the land ~~claimed~~ included by the complainant under this champertous contract lay in the State of West Virginia. The

claimant—the appellant here—then filed a bill—identical with his former bill—in the court of West Virginia. To this bill the plea of *res adjudicata* was filed, and on that issue the West Virginia court held that the plea presented a sufficient defense and bar to the complaint made in the bill.

The grounds of the present appeal are all set out in the three assignments of error recited above. They each and all consist of alleged errors committed by the State courts in their decisions of the two chancery causes.

The errors imputed to the Virginia courts are that the complainant was denied the right to file a third amended bill. If such denial was error it was error that cannot be corrected by this court on this appeal, because this is not an appeal from the decrees of the Virginia court. If it was, the appeal could not be sustained, because the reasons stated by the court for denying the leave asked are adequate and conclusive of the propriety of the ruling. It is in this ruling of the Virginia court denying leave to file a third amended bill that the appellant finds his only alleged Federal question. He insists that such denial by the Virginia court denied to him "due process of law." If it had that effect then the appeal to this court should have been taken from the decree of the Virginia court. It cannot be considered on this appeal.

The errors imputed to the West Virginia courts are that they gave "full faith and credit" to the records of the Virginia courts. The West Virginia courts recognized that the appellant here had invoked the jurisdiction of the Virginia courts in a cause based upon a Virginia contract, and said courts had declared such contract to be void because infected with champerty, and that the Virginia courts, upon argument and a full consideration, had adjudged and decreed that contract to be null and void, and had accordingly dismissed the bill. The authenticated record of the proceedings of the Virginia court was duly pleaded in bar of the suit of the West Virginia courts.

The complainant insisted before the West Virginia courts that while champerty might render the contract void in Virginia, yet that in West Virginia such contracts had been held valid and binding. But the West Virginia court replied that without admitting the fact to be as asserted, even if it was, principles recognized and enforced in *Fauntleroy vs. Lum*, 210 U. S., 239, compelled the adoption of the decision of the Virginia court as the rule of decision for the courts of West Virginia.

The Federal question relied on, then, even if it had been set out in the assignments of error or had been sufficiently presented in the record of proceedings of the West Virginia court, is too manifestly frivolous to claim due consideration by this court.

We submit that the decree complained of should be affirmed as manifestly right, or the appeal should be dismissed as taken for delay only.

HOLMES CONRAD,
EDW'D S. CONRAD,
Counsel for Mary H. Murray,
One of the Defendants in Error.

APPENDIX

EXTRACTS FROM THE TRANSCRIPT OF RECORD.

* * * * * * *

To the Honorable Robert Dailey, Judge of the Circuit Court of Pendleton County:

The bill of complainant of John E. Roller, respectfully represents that in the early part of the year 1873, through Richard C. McMurtrie, a distinguished lawyer of the city of Philadelphia, he entered into a contract with Emily Hollingsworth, of said city, under which he agreed to recover for her a tract of land of 52,757 acres known as the Hollingsworth Survey, lying partly in the County of Augusta and partly in the County of Rockingham, in the State of Virginia, and partly in the county of Pendleton, in the State of West Virginia, which had been sold away from the owners thereof for taxes, and was then claimed by others adversely, the said Emily Hollingsworth agreeing to give to your Complainant as a compensation for his services one-fifth of the net proceeds of all the lands recovered, it being agreed that there should first be paid out of said proceeds any and all expenses connected with the matter, in the State of Virginia, including the expenses of any suits that might be necessary, and of the sale of said lands, the said Emily Hollingsworth to pay all expenses that might be incurred outside of the State, it being further stipulated and agreed that the interest of your Complainant in said lands should not be sold unless your Complainant agreed to the price, and that no sale should be made regardless of the interests of your Complainant.

That subsequently all of these lands were cecovered, from those holding them adversely, and part of them were sold and these mat-ers adjusted between your Complainant and the said Emily Hollingsworth.

That on or about the first of April, 1889, the said Emily Hollingsworth made a conveyance of the unsold portion of said tract of land to Mary H. Murray, wife of Henry M. Murray, the said Mary H. Murray, agreeing to carry out the contract between the said Emily Hollingsworth and your complainant. That subsequently however the said Mary H. Murray while recognizing the right of your complainant to one-fifth interest in the proceeds of the sale of said lands has persistently refused to make any conveyance to your Complainant *to* one-fifth thereof and for a considarable space of time refused to acknowledge by letter or otherwise by an in-trument in writing the right of your Complainant to one-fifth of the proceeds either of the sale of said lands or the lands themselves and only did so after your complainant had threatened her with suit to compel her to give him such an instrument in writing, although the matter is one of very great importance.

Your complainant is now in possession of letters not only from the said Mary H. Murray but from the said Emily Hollingsworth as well, in which the rights of your Complainant are recognized and admitted. That the said Mary H. Murray, has ste-dily refused to accept and carry out that part of the agreement between your complainant and the said Emily Hollingsworth in which it was stipu-

lated and agreed that -here should be no sale of his interest in the lands unless he agreed to the price, and no sale made at all regardless of his interests, but has insisted and still insists that she alone has the right, to sell the property and to fix the price and terms of payment, that she has the right to make and control absolutely any and all the extensions of the terms of such payments, and the collection of the same, and to manage and control the same as she may choose, and that your complainant must accept whatever she chooses to pay him after she has received the money and his deducted therefrom such expences and such charges as she may choose to contract or allow without any consultation whatever with him or any right to interfere on his part.

That in pursuance of these claims then asserted by her the said Mary H. Murray together with her husband Henry M. Murray on the 23d day of December, 1892, without the consent of your complainant sold and conveyed to one George A. Wheelock the entire body of the Hollingsworth survey remaining unsold, consisting of 44,000 acres, excepting therefrom for her own personal benefit a tract of 100 acres at the Pendleton Spring at the price of $132,000.00, of which $7,500.00 was to be paid in cash, and the residue of the purchase money was to be paid as follows to-wit: $7,500.00 one year from said date, $5,000.00 in 18 months from the said d*tae*; $5,000.00 in two years from said d*tate*; $107,000.00 in 30 months from said date, and the deed making said conveyance in which the lands are specifically described was recorded on the 18th day of January, 1893, in the Clerk's Office of the County Court of Rockingham County, Virginia, and a deed of trust given by George A. Wheelock to Holm-s Conrad, Trustee, to secure said deferred purchase money dated on the 23rd day of January, 1893, was recorded in the same Clerk's office, 23d day of February, 1893.

That your Complainant was not notified in regard to this sale and -new nothing of it until it had been consum-ated and made, and shortly thereafter he instituted his suit in chancery in the Circuit Court of Rockingham County vs. the said Mary H. Murray, Henry M. Murray, and the said Wheelock whom he was informed bore the given name of William A. Wheelock and at the same time in connection with said suit docketed his lis pendens in the Clerk'*f* office of the County Court of said County, in which he gave notice of the institution of said suit, and declared that it was instituted for the purpose of obtaining a decree "which shall recognize my right to one-fifth of the net proceeds of the lands conveyed to the said Mary H. Murray, by Emily Hollingsworth by deed duly of record in the Clerk's office of the County Court of said County, after deducting excences of suit and sale, excluding expences outside the State of Virginia and to deny, to the said Mary H. Murray, the right to sell said lands unless I agree to the price or to sell regardless of my interests and which shall hold as invalid and -effectual so far as my rights and interests are concerned any sale made by the said Mary H. Murray, to William A. Wheelock, or any other person without my consent and any conveyance attempted to be made by her to him or an*f* other person and the interests of the said Mary H. Murray and her

husband Henry M. Murray, if any he has and of the said William A. Wheelock, or other vendee to the said Mary H. Murray are intended to be affected by said suit. That subsequently, however, being desirous of avoiding any litigation with the said parties in interest, after having given notice to the said Wheelock and received an acknowledgment from him, of the fact that he knew of the rights and interests of your complainant in said sale, your complainant did consent that the sale to said Wheelock might stand and that he would receive his part of the purchase money without any prejudice to his right to assert his claim to a one-fifth interest therein in the event that it should be jeopardized in any way by anything which either the said Mary H. Murray or the said Wheelock or either or both of them might do.

That your Complainant was entitled to one-fifth of the purchase money of this sale and that this fact was known to George A. Wheelock, as well as to the said Mary H. Murray, cannot and will not be denied, for your complainant has the proof in writing of the fact.

That your complainant has received one-fifth of the cash payment and that matter is closed. That he received ($1,139.02) Eleven hundred and thirty-nine — and two cents of the 12th day of January, 1894, on account of his fifth of the first deferred payment, and ($60.00) Sixty dollars on the 3d day of April, 1895, and ($30.00) on the 12th day of July, 1895, on account of his one-fifth interest, *interest* in said purchase money but the whole of the remainder remains unpaid.

That notwithstanding the fact that your complainant was entitled to one fifth of the purchase money aforesaid, and both the said George A. Wheelock and the said Mary H. Murray were well aware of the fact yet on the 29th day of January, 1901, the two conspired together, to disregard the rights and interests of your complainant, and to abrogate release, and destroy his one fifth interest in the remaining purchase money, made a sale of said property, the said Holm-s Conrad, Trustee, uniting in the deed of conveyance to a corporation styled itself the Chesapeake Western Company, and by deed of that date conveyed the same to said Company for the consideration of $126,000.00 to be paid and secured to be fair to the said Mary H. Murray and at the same time she the said Mary H. Murray, received from the said Chesapeake Western Company, the sum of $15,000.00 in cash and three bonds for the deferred payment of $37,000.00 each due at 18, 30, and 42 months respectively, payable annually with interest from date at the rate of five percentum per annum, and both the deed of conveyance and said deed of trust were admitted to record on the same day in the Clerk's office in the said County of Rockingham, it being recited that on the face of said deed of conveyance to the said Chesapeake Western Company that the said George A. Wheelock had *had* in consideration of the cancellation, and release to him of said obligations agreed to unite with the said Marry H. Murray in the said conveyance, in the face of the fact that both of said grantors as well as the said grantee knew of the rights of your complainant as hereinbefore set forth and there

was paid to the said George A. Wheelock for his uniting in the conveyance of this land a large sum of money.

That as your complainant avers that the Chesapeake Western Company had formal notice, of the fact that your complainant was entitled to one fifth of the purchase money due from George A. Wheelock prior to the date of said conveyance having been notified to that effect, long before the sale was consum-ated so that said Company does not occupy any position which imposes upon the Court any obligation to intervene in its behalf. Wherefore being remediless save in equity where matters of this sort are alone and properly cognizable your complainant prays that George A. Wheelock, Marry H. Murray, her husband Henry M. Murray who is made defendant with her for the sake of conformity, Holm-s Conrad, Trustee, and the said Chesapeake Western Company, a corporation, may be made parties defendant of this bill, and be required to answer under oath being waived that the right of your complainant to one fifth of the purchase money due from George A. Wheelock under the deed of trust of January 23rd, 1892, may be decreed to him and that the lien of the deed of trust given to secure the same may be enforced, and that such further and other relief may be given as the nature of the case may require or to equity may seem meet.

May process issue, and he will ever pray, etc.

JOHN E. ROLLER,
Im Propria Persona.

Bill filed May the 10th, 1901.

I. E. BOLTON, *Clerk.*

* * * * * * *

To the Honorable Judge of the Circuit Court of Pendleton County, West Virginia:

The amended bill of complaint, John E. Roller, respectfully represents: That in the year 1901, he instituted a suit in this honorable Court wherein he was plaintiff and Mary H. Murray, Henry M. Murray, George A. Wheelock, Holm-s Conrad, Trustee, and the Chesapeake Western Company, a corporation, were defendants; that the original bill in said suit was filed October Rules 1901, and is in the following words and figures to-wit:

To the Honorable Robert Dailey, Judge of the Circuit Court of Pendleton County:

The bill of complaint of John E. Roller, respectfully represents, that in the early part of the year 1873, through Richard C. McMurtrie, a distinguished lawyer of the city—Philadelphia, he entered into a contract with Emily Hollingsworth of said city, under which he agreed to recover for her a tract of land of 52,757 acres know- as the Hollingsworth survey, lying partly in the County of Augusta and partly in the County of Rockingham in the State of Virginia, and partly in the County of Pendleton in the State of West Virginia, which had been sold away from the owners thereof

for taxes, and was then claimed by others adversely, the said Emily Hollingsworth agreeing to give to your complainant as a compensation for his services one-fifth of the net proceeds of all lands recovered, it agreed that there should first be paid out of said proceeds, any and all expences connected with the matter in the State of Virginia including the expences of any suits that might be necessary, and of the sale of said lands the said Emily Hollingsworth to pay all expences that might be incurred outside of the State it being further stipulated and agreed that the interests of your complainant in said lands should not be sold unless your complainant agreed to the price and that no sale should be made regardless of the interest of your complainant.

That subsequently all of these lands were recovered from those holding them adversely, and parts of them were sold and these mat-ers adjusted between your complainant and the said Emily Hollingsworth.

That on or about the 1st of April, 1889, the said Emily Hollingsworth, made a conveyance of the unsold portion of said tract of land to Mary H. Murray wife of Henry M. Murray, the said Mary H. Murray agreeing to carry out the contract between the said Emily Hollingsworth and your complainant.

That subsequently however the said Mary H. Murray while recognizing the right of your complainant to one-fifth interest in the proceeds of the sale of the lands has persistently refused to made any conveyance to your complainant to one-fifth thereof and for a considerable space of time refused to acknowledge by letter or otherwise by an instrument in writing the right of your complainant to one-fifth of the proceeds either of the sale of said or of the lands themselves and only did so after your complainant had threatened with suit to compel her to give him such an instrument in writing although the matter in one of very great importance, your complainant is now in possession of letters not only from the said Mary H. Murray but from the said Emily Hollingsworth as well in which the rights and interests of your complainant are recognized and admitted.

That the said Mary H. Murray has steadily refused to accept and carry out that part of the agreement between your complainant and the said Hollingsworth in which it was stipulated and agreed that there should be no sale of his interest in said lands unless he agreed to the price and no sale made at all regardless of his interests, but has insisted and still insists that she alone has the right to sell the property and to fix the price and terms of payment that she has the right to make and control absolutely any and all extensions of the terms of such payments, and the collection of the same and to manage and control the same as she may choose and that your complainant must accept whatever she chooses to pay him after she has received the money and has deducted therefrom such expences and such charges as she may choose to contract or allow, without consultation whatever with him or any right to interfere on his part. That in pursuance of these claims then asserted by her the said Mary H. Murray together with her husband Henry M. Murray

on the 23d day of December, 1892, without the consent of your complainant, sold and conveyed to one George A. Wheelock the entire body of the Hollingsworth survey remaining unsold consisting of 44,000 acres, excepting therefrom for her own personal benefit a tract of 100 acres at Pendleton Spring at the price of $132,000.00 of which *$75,000.00* was paid in cash and the residue of the purchase money was to be paid as follows to-wit: $7,500.00 in one year from said date; $5,000.00 in 18 months from said date; $5,000.00 in two years from said date; and $107,000.00 in 30 months from said date and the deed making said conveyance in which said lands are specifically described was recorded on the 18th day of January, 1893, in the Clerk's office in the County Court of Rockingham County, Virginia, and a deed of trust given by George A. Wheelock to Holmes Conrad, Trustee to secure said deferred purchase money dated on the 23d day of January, 1893, was recorded in same Clerk's office on the 23d day of February, 1893. That your complainant was not notified of this sale and knew nothing of it until it had been consum-ated and made, and shortly thereafter he instituted his suit in Chancery in the Circuit Court of Rockingham County against the said Mary H. Murray, Henry M. Murray and the said George A. Wheelock who he was informed bore the name of William A. Wheelock at the same time in connection with said suit docketed his lis pendens in the Clerk's office in the County Court of said County in which he gave notice of the institution of said suit and declared that it was instituted for the purpose of obtaining a decree which shall recognize my right to one-fifth of the net proceeds of the land conveyed to the said Mary H. Murray by Emily Hollingsworth by deed duly of record in the Clerk's office of the County Court of said County after deducting the expences of suit and sale, excluding expenses outside of the State of Virginia, and to deny to the said Mary H. Murray the right to sell said lands unless I Agree to the price or to sell regardless of my interests which shall hold as invalid and ineffectual so far as my rights and interests are concerned, any sale made by the said Mary H. Murray to William A. Wheelock or any other person with out my consent and any conveyance attempted to be made by her to him or any other person and the interests of the said Mary H. Murray and her husband Henry M. Murray if he has any and of the said William A. Wheelock or other vendee to the said Mary H. Murray are intended to be affected, by said suit. That subsequently however, being desirous of avoiding any litigation with the said parties in interest after giving notice to the said Wheelock and received and acknowledgement from him, of the fact that he knew of the rights and interests of your complainant in said sale, your complainant did consent that the sale to the said Wheelock might stand and that he would receive his part of the purchase money without any prejudice to his right to assert his claim to a one-fifth interest therein in the event that it should be jeopardized in any way by any thing which either the said Mary H. Murray or the said Wheelock or either or both of them might do. That your complainant was entitled to one fifth of the purchase money of this sale and that this

fact was known to George A. Wheelock as well as to the said Mary H. Murray and cannot and will not be denied, for your complainant has the proof in writing of the fact.

That your complainant has received one fifth of the cash payment and that matter is closed. That he received ($1,139.02) eleven hundred and thirty nine dollars and two cents on the 12th day of January, 1894, on account of his fifth of the first deferred payment, and $60.00 sixty dollars on the 3d day of April 1895, and ($30.00) thirty dollars on the 12th day of July, 1895, on account of his one fifth interest in the purchase money, but the whole of the remainder remains unpaid.

Notwithstanding the fact that your complainant was entitled to one fifth of the purchase money aforesaid, and that both the said George A. Wheelock and the said Mary H. Murray were well aware of the fact, yet on the 29th day of January, 1901, the two conspired together to disregard the rights and interests of your complainant, and to abrogate, release and destroy his said one fifth interest in the remaining purchase money, made a sale of said property, the said Holm-s Conrad, Trustee, uniting in the deed of conveyance to corporation styling itself the Chesapeake Western Company, and by deed of that date conveyed the same to said company for the consideration of $126,000.00 to be paid and secured to be fair with the said Mary H. Murray and at the same time she, the said Mary H. Murray received from the said Chesapeake Western Company the sum of $15,000.00 in cash and three bonds for the deferred payments of $37,000.00 each, due at 18, 30, and 42 months respectively, payable annually with interest from date at the rate of 5% per annum and both the deed of conveyance and the said deed of trust were admitted to record on the same day in the Clerk's office of the said County of Rockingham, it being recited on the face of said deed of conveyance to the Chesapeake Western Company, that the said George A. Wheelock had in consideration of the cancellation and release to him of his said obligations agreed to unite with the said Mary H. Murray, in the conveyance, in the face of the fact, that both of the said grantors as well as the grantee knew of the rights of your complainant as hereinbefore set forth and there was paid to the said George A. Wheelock for his uniting in the conveyance of this land a large sum of money. That your complainant avers that the Chesapeake Western Company, had formal notice of the fact, that your complainant was entitled to one fifth of the purchase money due from George A. Wheelock prior to the date of said conveyance having been notified to that effect long before the sale was consum-ated so that said Company does not occupy any position which imposes upon the Court any obligation to interfere in its behalf. Wherefore being remediless save in equity where mat-ers of this sort are alone properly re-*go*nizable your complainant prays that George A. Wheelock, Mary H. Murray, her husband Henry M. Murray, who is made defendant with her for the sake of conformity, Holmes Conread, Trustee, and the said Chesapeake Western Company, a corporation, may be made parties defendant to this bill, and be required to answer, answer under oath being waived, that

the right of your complainant to one fifth of the purchase money due from George A. Wheelock under the deed of trust of January 23d, 1892, may be decreed to him and that the lien of the deed of Trust given to secure the same may be enforced, and such further and other relief may be given as the nature of the case may require or to equity may seem meet.

May process issue and he will ever pray, etc.

JOHN E. ROLLER.

A copy.
Attest:

I. E. BOLTON,
Clerk Circuit Court, Pendleton County, W. Va.

That since filing of said original bill the said Henry M. Murray has departed this life and your complainant is advised that the said Chesapeake Western Company has sold the real estate in said bill described to the Pocahontas Company, a corporation.

Your complainant is advised that thereafter on the — day of November, 1901, the said Chesapeake Western Company appeared and filed its answer to said bill, being the only defendant that has appeared and pleaded to said bill and that no other proceedings have since been had in the cause.

Your complainant being advised that it is proper in view of the matters and facts hereinafter to be referred to that he should amend his said bill, brings this, his amended bill of complaint, and respectfully shows the court:

(1.) That in the year 1872 shortly after the admission of the complainant to the bar as Attorney-at-law, he was employed by the late Emily Hollingsworth, of the City of Philadelphia, as such attorney to recover for her a tract of fifty two thousand acres of land, situated in the Counties of Rockingham and Augusta in the State of Virginia and the County of Pendleton in the State of West Virginia, which had been lost to the true owners thereof, and your complainant immediately undertook the work and labor necessary to the premises, making extensive examinations of titles to a large number of tracts of land, investigating the titles of adverse claimants, locating interior as well as exterior lines of survey and the numerous claimants thereto, in which he diligently and faithfully endeavored to discharge the onerous duties imposed by the said employment.

(2.) That from time to time various parcels of lands were recovered from adverse claimants, compromise settlements having been *been* made as to some, and others being recovered by actions of ejectment in the Courts of Virginia and West Virginia and in the United States Court with proper jurisdiction until the entire tract of Fifty-two thousand acres was recovered for the said Emily Hollingsworth, the actual litigation in Court not being completed until some time in the year 1893.

(3.) Your complainant does not deem it necessary to recite in detail the work and labor performed by him as aforesaid, resulting in great advantage to his said client, or to enumerate other and additional labor and services performed by him in connection with the

management and supervision of the sale of prøtions of the property and of the options on the lands under which large sums of money were received so that in the year 1889, there had remained of the said lands recovered as aforesaid about 44,000 acres not disposed of, from the proceeds of the sale of which your complainant was to receive payments on account of his said services.

(4.) On or about the first of April, 1889, the said Emily Hollingsworth made a deed of gift of the said unsold portion of said lands amounting to about 44,000 acres to her relative Mary H. Murray, in consideration of, and upon the condiition that she should pay your complainant one-fifth of the proceeds thereafter to be realized on the sale of the said land and that she should hold the same as trustee for your complainant, and your complainant avers and charges that the said Mary H. Murray accepted said deed for said consideration and upon said condition and became liable to your complainant for the said proportion of said proceeds of sale and for the reasonable value of his services rendered by him as aforesaid, to Miss Hollingsworth, and to be thereafter continued and rendered by him to the said Mary H. Murray, which the said Mary H. Murray thereupon agreed and promised to pay to your complainant.

(6.) Complainant further shows your honor that early in the year 1893, being apprehensive that the said Mary H. Murray would not be willing to make compensation for his services as aforesaid, made a memorandum of suit and docketed a lis pendens against the said Mary H. Murray and George A. Wheelock in the Circuit Court of Rockingham County, and subsequently beimg desirous of avoiding litigation your complainant withdrew said proceedings in consideration of an agreement now to be referred to had with the said Mary H. Murray namely, that the sale to the said Wheelock might stand without prejudice to the rights of your complainant in the premises and that he would receive in full satisfaction for his services and claims an amount equal to one-fifth of the purchase money arising from the sale as aforesaid to the said George A. Wheelock and thereupon the said Mary H. Murray, paid to your complainant $1,500.00 less some small items of expense dedlucted and thereafter the further sum of $1,500.00 and subsequently two further sums, one of $60.00 and the other of $30.00 leaving to your complainant, according to the understanding and agreement as aforesaid, the sum of $23,400.00 with interest on $1,000.00, part thereof from June 23d, 1894, and $1,000.00 part thereof from December 24, 1894, and on $21,400.00 the residue thereof, from June 23d, 1895, to be credited said payments of $60.00 April 23d, 1895, and $30.00 July 12th, 1895.

(8.) Complainant further avers that after the conveyance of said land by the said Emily Hollingsworth to the said Mary H. Murray and about the time of the withdrawal of the suit as aforesaid complainant was assured by the said Emily Hollingsworth with the full knowledge of the said Mary H. Murray that the payment of the debt due to your complainant for his services as aforesaid, had been undertaken and assumed by Mary H. Murray as a condition upon which the conveyances had been made from the said Emily Hol-

lingsworth to her relative as aforesaid, and your complainant, avers, but that for the said assurance aforesaid under the circumstances aforesaid he would have instituted suit to enforce his rights in the life time of the said Emily Hollingsworth and further avers that the said Mary H. Murray having accepted the conveyance aforesaid, continued to act thereunder and in conformity therewith as did your complainant, until the 25th day of May 1901, when for the first time she repudiated the same.

(9.) Under the circumstances your complainant is advised and avers that he is entitled to recover the sum of $23,400.00 with interest on one thousand dollars thereof from June 23d, 1894 and on one thousand dollars another part thereof from December 24th, 1894, and on Twenty-one thousand four hundred dollars the residue thereof from June 23d, 1905, subject to a credit, Sixty dollars April 3d, 1895, and Thirty dollars July 12th, 1895.

The Complainant further shows your honor that since the institution of this suit, and the filing of the original bill the Chesapeake Western Company, has sold and conveyed the said land referred to in said original bill to the new corporation called the Pocahontas Company, but which Company your complainant avers is the same corporation in fact as the Chesapeake Western Company and is owned and controlled by the same persons, that own and control the Chesapeake Western Company, the said deed of conveyance of the said lands to the said Company having been admitted to record in the Clerk's office of the County of Rockingham on the 5th day of June, 1903, and thereafter in the county of Augusta in the state of Virginia, and in this, the County of Pendleton, State of West Virginia, and thereafter the said grantee, the Pocahontas Company, immediately conveyed the said lands to the Bowling Green Trust Company, a corporation organized under the laws of the State of New York, in trust to secure an issue of five hundred thousand dollars of first mortgage bonds copies of the said deeds are herewith exhibited and are prayed to be taken and read as parts of this bill.

Your complainant avers that the said Pocahontas Company is now in possession of said lands, but is insolvent and without the means of paying the damages which may be recovered against it in any action at law; that the lands ar[illegible] wild mountain lands chiefly valuable for the bark and timber growing on the same and when denuded thereof will be comparatively worthless and will not begin to bring an amount sufficient to pay to your complainant the debt now owing to him as aforesaid; that your complainant is informed, believes and charges that the said Pocahontas Company without having paid the purchase money due by it as aforesaid, to its vendor, the Chesapeake Western Company, the Chesapeake Western Company not having paid its purchase money due by it to the said Mary H. Murray, and the said George A. Wheelock not having paid the purchase money due by him to the said Mary H. Murray under the sale made to him is nevertheless through the agents servants and employees engaged in cutting timber on said lands and in peeling of all bark thereon and removing the same from the premises and

in fact denuding the entire boundary of every piece of merchantable timber of every sort, and description that can possibly — utelized with any profit whatever, and is paying a considerable sum far less than its real value monthly to Mary H. Murray as stumpage as the price for the timber standing upon the ground and that if the said Company is permitted removing said timber it will deprive the complainant of the security held by him for what is justly due him as asserted in this cause and leave him without any adequate remedy.

Wherefore being remediless save in a court of equity where all matters of this sort are alone and properly cognizable, your complainant prays that the said Mary H. Murray, George A. Wheelock, and the Chesapeake Western Company a corporation, the Pocahontas Company, a corporation, the Bowling Green Trust Company, a corporation, and Holmes Conrad, Trustee may be made parties defendant to this bill and required to answer *under* oath being waived, that an order of publication may be made and executed as to the said defendants all of whom are nonresidents of the state of West Virginia that the estate hereinbefore named so far as the same is situated in the County of Pendleton in the State of West Virginia, consisting of about Seventeen thousand acres may be attached and subjected be a decree of this honorable court and applied to the satisfaction of the debt due the complainant as aforesaid, that the right of the complainant to one-fifth of the purchase money due from said Wheelock under the *sadi* deed of trust of January 23d, 1893 may be decreed to him and that the *lein* of said deed given to secure the same may be enforces and that in the meantime and in the further order of this honorable court the said Pocahontas Company and the Chesapeake Western Company, their officers, agents, servants and employees, and the said George A. Wheelock, and the said Mary H. Murray may be enjoined and restrained from cutting any timber pealing any bark, making any ties, sawing or cutting into lumber any timber that has been already cut upon the lands referred to in the foregoing bill, or from removing any bark, ties, timber or lumber cut or sawed from said lands until the further order of this honorable court; and that the complainant may have all such other further and general relief as in equity may seem meet.

And he will ever pray, etc.

JOHN E. ROLLER,
By COUNSEL.

SIPE AND HARRIS, *Counsel.*

STATE OF VIRGINIA,
County of Rockingham, To wit:

On this 9th day of December 1907, personally appeared before me Gilbert R. Spitzer a Notary Public, in and for the County aforesaid, in the State of Virginia, John E. Roller, complainant in the foregoing bill and made oath that the statement contained in the bill so far as made upon his own knowledge are true, and those

made upon the knowledge or information derived from others he believes to be true.

Given under my hand this the 9th day of December, 1907.

GILBERT R. SPITZER, *N. P.*

My commission expires October the 8th, 1911.

* * * * * * *

In Chancery.

JOHN E. ROLLER
vs.
MARY H. MURRAY and Others.

The Plea of the Above Named Defendant, Mary H. Murray, to the Bill of Complaint as Amended, Filed in the Circuit Court of Pendleton County, West Virginia.

The defendant Mary H. Murray, by protestation not confessing or acknowledging all or any of the matters or things in the said bill of complaint mentioned to be true in such manner or form as the same are herein set forth and alleged doth plead thereto and for plea says:

That in a Chancery cause brought by the said John E. Roller the complain-t against the said Mary H. Murray, jointly with other persons named in said bill, in the Circuit Court for the County of Rockingham, in the State of Virginia which is and was a Court of competent jurisdiction, the said John E. Roller did therein assert and claim that there was due him from the said Mary H. Murray the same sum of money and the same debt which is now asserted in the bill filed in this cause it being for the amount of compensation which was claimed by him to be due to him for the same services rendered, alleged in this bill, and this defendant avers that this is the same cause of action now set up and asserted in the present cause.

This defendant further avers that on the 24th day of June 1907 a decree was made and entered in said cause by the said Circuit Court in conformity with two written opinions delivered by the said Circuit Court, one on the 19th of March 1907, and the other of the 24th of June 1907, which was a final decree and that from that decree an appeal was taken by the complainant John E. Roller, to the Supreme Court of Appeals of Virginia by which the decree of the Circuit Court of Rockingham County was affirmed, and the said Supreme Court of Appeals of Virginia adopting the written opinions of the Judge of the Circuit Court of Rockingham County aforesaid as their own, which said opinion is found in volume 59, No. 5, page 421, (date of December 14th, 1907) of the Southeastern Reporter also, in Virginia appeals Vol. 1, page 524, &c., in which said opinion of the Supreme Court of Appeals of Virginia, at page 425 (59 S. E.) it was held that this defendant, Mary H. Murray, was a privy in

estate to Miss Hollingsworth, her grantor, and a privy also to the contract with General Roller, that Mrs. Murray is not only a privy in estate of Miss Hollingsworth with the right to make any defense to General Roller's demand that Miss Hollingsworth could have made; but that she expressly took over the contract to be bound as Miss Hollingsworth was, taking Miss Hollingsworth's shoes, in the contract with General Roller's Consent and became his client under the terms of the contract before the litigation was ended. (Page-425-6.) And the said Supreme Court of Appeals affirming the Circuit Court determined that the said complainant had no right to recover on said cause of action.

And this defendant avers that the cause of action set forth and presented in this pending cause in the bill of the said Complainant, John E. Roller, is the same cause of action that was presented and set forth by the said John E. Roller, in the bill in Chancery filed by him against this defendant in the said Circuit Court and which was finally adjudicated and determined, by the Supreme Court of Appeals of Virginia as aforesaid, and that the case was finally presented and adjudicated was in all of its essentials and material features and is the same case which is now presented, and on which relief is prayed in the pending cause.

Therefore this defendant does plead the final adjudication, of the Supreme Court of Appeals of Virginia, to the said bill and craves the judgment of the said Court whether she should be compelled to make further answer to said bill, and prays to be hence dismissed with her reasonable costs and charges in that behalf most wrongfully sustained. A certified copy of the record of the proceedings had in the Circuit Court of Rockingham, Va., and in the Supreme Court of Appeals of Virginia is filed herewith.

MARY H. MURRAY.

Teste:
EDGAR SHEPHERD.

* * * * * * *

To the Honorable T. N. Hass, Judge of the Circuit Court of Rockingham County, Virginia:

Humbly complaining your orator, John E. Roller, brings his bill of complaint and respectfully shows the court:

(1) That in the year 1872 shortly after the admission of complainant to the bar as attorney at law, he was employed by the late Emily Hollingsworth of the City of Philadelphia, as such an attorney, to recover for her a tract of fifty-two thousand acres of land situated in the Counties of Rockingham and Augusta in the State of Virginia and the County of Pendleton in the State of West Virginia, which has been lost to the true owners thereof and your complainant immediately undertook the work and labor necessary in the premises making extensive examinations of titles to large number of tracts of land, investigating the titles of adverse claimants locating interior as well as exterior lines of the survey, and of the the numerous claimants thereto, in which he diligently and faith-

fully endeavored to discharge the onerous duties imposed by the said employment.

(2) That from time to time various parcels of said land were recovered from adverse claimants, compromise settlements having been made as to some, and others being recovered by actions of ejectment in the Courts of Virginia and West Virginia and in the United States Court with the proper jurisdiction until the entire tract of fifty two thousand acres was recovered for the said Emily Hollingsworth, the actual litigation in court not being completed until sometime in the year 1893.

(3) Your complainant does not deem it necessary to recite in detail the work and labor performed by him as aforesaid, resulting in great advantage to his client, or to enumerate other and additional labors and services performed by him in connection with the management and supervision of the sale of portions of the property and of options on the lands under which large sums of money were received by his client so that in the year 1889 there remained of the lands recovered as aforesaid, about 44,000 acres not disposed of from the proceeds of the sale of which your complainant was to receive payments on account of his said services.

(4) On or about the first day of April, 1889, the said Emily Hollingsworth made a deed of gift of the said unsold portion of the land amounting to about 44,000 acres to her relative, Mary H. Murray, in consideration of, and upon the condition that she should pay to your complainant one-fifth of the proceeds thereafter to be realized on the sale of the said land and that she should hold the same as trustee for your complainant and your complainant avers and charges that the said Mary H. Murray accepted said deed for said consideration and upon said condition and became liable to your complainant for the said proportion of the proceeds of sale as and for the reasonable value of his services rendered by him as aforesaid, to Emily Hollingsworth, and to be thereafter continued and rendered by him to the said Mary H. Murray, which the said Mary H. Murray thereupon agreed and promised to pay to your complainant.

(5) Your complainant further avers that on the 23d day of December, 1892, Mrs. Murray in conjunction with her husband H. M. Murray, sold and conveyed the said fourty-four thousand acres to George A. Wheelock, except one hundred acres at the Pendleton Spring at the price of one hundred and thirty-two thousand dollars, and contemporaneously therewith accepted a deed of trust to Holmes Conrad, Trustee, executed by said vendee, conveying the same land to secure the deferred portion of said purchase money aggrigating one hundred and seventeen thousand dollars and the deed was recorded on the 27th day of January, 1893, copies of said deeds as herewith filed and prayed to be read and taken as a part of this bill.

(6) The Complainant further shows your honor that early in the year 1893, being apprehensive that the said Mary H. Murray would not be willing to make compensation for his services as aforesaid, made a memorandum of suit and docketed a lis pendens against the

said Mary H. Murray and George A. Wheelock and subsequently being desirous of avoiding litigation, your complainant withdrew said proceedings in consideration of an agreement now to be referred to had with the said Mary H. Murray, namely; that the sale to Wheelock might stand without prejudice to the rights of your complainant in the premises and that he would receive in full satisfaction of his services and claims an ammount equal to one fifth of the purchase money arising from the sale aforesaid, to the said George A. Wheelock, and thereupon the said Mary H. Murray paid to you- complainant fifteen hundred dollars less some small items of expense deducted, and thereafter the further sum of fifteen hundred dollars and subsequently two other sums, one of sixty dollars and the other of thirty dollars, leaving owing to your complainant according to the understanding and agreement as aforesaid the sum of *twenty-three* thousand four hundred dollars with interest on one thousand dollars part thereof, from June 23d, 1894, and on one thousand dollars another part thereof from December 24, 1894, and on twenty one thousand four hundred dollars, the residue thereof, from June 23rd, 1895, to be credited by said payments of sixty dollars April 3, 1895, and thirty dollars July 12, 1895.

(7) The complainant further shows the court that the said Emily Hollingsworth departed this life in the year 1895, having first made her last will and testament, an exemplified copy marked Exhibit "W" is filed herewith and prayed to be read as a part hereof, from which it will appear that the said Emily Hollingsworth expressly charges her estate, real and personal with the payment of her debts, including of course the debt of your complainant, wherein it was further provided also that the conveyance that had been made by the said Emily Hollingsworth to the said Mary H. Murray of the lands of the testator in the Counties of Rockingham and Augusta in the State of Virginia and the County of Pendleton in the State of West Virginia and should stand affirmed in which the testatrix devised to the said Mary H. Murray all right title and interest of the said Emily Hollingsworth in and to said lands, in which it was also provided that the said Mary H. Murray was to receive in addition to said tract of land the further sum of nine thousand one hundred and fifty-three dollars and thirty cents as the amount theretofore realized by the said testatrix from the said property, the will reciting that it had been the purpose of the said Emily Hollingsworth all the time to give the tracts of land to the said Mary H. Murray as a whole.

(8) Complainant further avers that after the conveyance of said land by the said Emily Hollingsworth to the said Mary H. Murray and about the time of the withdrawal of the suit as aforesaid complainant was assured by the said Emily Hollingsworth with the full knowledge of the said Mary H. Murray that the payment of the debt due your complainant for his services had been undertaken and assumed by Mary H. Murray, as a condition upon which the conveyance had been made from the said Emily Hollingsworth to her relative as aforesaid and your complainant avers but that for the said assurance as aforesaid, under the circumstances afore-

said, he would have instituted suit to enforce his rights in the lifetime of the said Emily Hollingsworth and further avers that the said Mary H. Murray having accepted the conveyance aforesaid and the said devise and bequest continued to act thereunder and in conformity therewith as did your complainant until the 25th of May, 1901, when for the first time she repudiated the same.

(9) Under the circumstances your complainant is advised and avers that he is entitled to recover the sum of twenty-three thousand four hundred dollars with interest on one thousand dollars part thereof from June 23rd, 1894, and on one thousand dollars another part thereof from December 24, 1894, and on twenty-one thousand four hundred dollars, the residue thereof from June 23, 1895, subject to a credit of Sixty dollars, April 3, 1895, and thirty dollars July 12th, 1895.

(10) Your complainant further avers that the said Mary H. Murray is not a resident of the State of Virginia and that she has debts due her in the County of Rockingham in the State of Virginia, namely; a large debt due her from the Cresapeake Western Company and the Pocahontas Company and a large debt due her from the First National Bank of Harrisonburg, Virginia, a corporation doing business under the laws of the United States.

(11) Wherefore being remediless save in a Court of equity where matters of this sort are alone and properly cognizable your complainant prays that the said Mary H. Murray, the Chesapeake Western Company, a corporation; the Pocahontas Company, a corporation, and the First National Bank of Harrisonburg, Virginia, a corporation may be made parties defendant to this bill and required to answer the same, under oath being waived; that an order of publication may be made and executed as to the said Mary H. Murray, a non-resident of the State of Virginia, that the estate hereinbefore named may be attached and subjected by decree of this Honorable Court and applied to the satisfaction of the indebtedness due complainant as aforesaid; that all proper inquiries may be directed and accounts taken; and that complainant may have all such other, further and general relief as in equity may seem meet.

And he will ever pray, etc.,

JOHN E. ROLLER,

By Counsel, —— ——.

SIPE AND HARRIS, *Counsel.*

A copy test:

D. H. LEE MARTZ, *Clerk.*

* * * * * * *

In the Circuit Court of Pendleton County, West Virginia.

JOHN E. ROLLER, Complainant,
vs.
MARY H. MURRAY et als., Defendants.

John E. Roller, the complainant objects to the filing of the plea of re- adjudicata tendered by the defendants Mary H. Murray on the following grounds:

1st. That it appears that the Circuit Court of Rockingham County Virginia, the Court which ordered the judgment pleaded in said plea of the defendant did, after the rendition thereof, in a certain other *course* in said court pending, entitled Chesapeake Western Company vs. John E. Roller et als., in which latter cause the said Mary H. Murray was duly impeached and was a party and exemplified copy of the same being herewith exhibited, marked ex-record No. 2 adjudged and decreed that the matters involved in the cause now pending in the Circuit Court of Pendleton County, West Virginia, were not rea adjudicata by the judgment and decree rendered in the cause of Roller vs. Murray lately pending in the Circuit Court of Rockingham County Virginia, and did therefore by its order duly enrolled on the 10th day of October 1907, vac*tae* set aside and dis-olve all injunctions previously awarded in said cause enjoying and restraining this complainant from further prosecution in the Circuit Court of Pendleton County, W. Va., this his suit against the said defendant, Mary H. Murray.

2nd. That the cause of action and grounds of jurisdiction and relief in this cause are not the same as those set out and contained in the record of the cause vouched in the plea of res adjudicata tendered by the defendant Mary H. Murray.

(3) That the said plea vouches the record and judgment of a court of a sister state which this court will not enforce as res adjudicata in this cause for the following reasons:

(*a*) The courts of West Virginia do not enforce foreign judgments that are contrary to the laws and public policy of this state, to enforce the Judgment pleaded would be to enforce in this state a law against the policy of the law of Virginia but not against the law of the policy of the State of West Virginia.

(*b*) That the decree is not grounded upon rights arising ex contractu or upon torts based upon the natural rights but that the same rests upon a penalty denounced by the policy of the law of the State of Virginia, which is not so denounced by the policy of the law of the State of West Virginia: that it is not one of such nature as the Courts of West Virginia will enforce.

(*c*) That the lex loci ceisti determines the jurisdiction and relief to be given by this court as to the land in the bill referred to regardless of the judgment of any sister state as to the law of that State as to the land therein situate.

JOHN E. ROLLER,
By COUNSEL.

SIPE AND HARRIS,
Of Counsel.

* * * * * * *

In the Circuit Court of Pendleton County, West Virginia.

JOHN E. ROLLER, Complainant,
vs.
MARY H. MURRAY, and Others, Defendants.

To the Honorable R. W. Dailey, Jr., Judge of the Circuit Court of Pendleton County, West Virginia:

The second amended bill of complaint of John E. Roller respectfully represents:

That as appears from the record and proceedings in this cause he instituted suit in this Honorable court in the year 1901 wherein he was complainant and Mary H. Murray George A. Wheelock, Henry M. Murray, Holmes Conrad, Trustee, and the Chesapeake Western Company, a corporation were defendants.

That said original bill, in said suit, was filed at October Rules 1901, and thereafter the said complainant filed his amended bill of complaint in Dec., 1907, wherein the said Mary H. Murray, George A. Wheelock, the Chesapeake Western Company the Pocahontas Company, the Bowling Green Trust Company all of said Companies being corporations and Holmes Conrad, Trustee, were defendants.

That upon the filing of said amended bill an injunction was awarded by this honorable court on the 14th day of December 1907 and that for convenience your complainant asks that said amended bill and the injunction awarded therein, may be deemed taken and read as though fully written out in this part of his second amended bill.

That thereafter one of said defendants namely: Mary H. Murray, appeared and filed a demurrer and certain pleas to said original and amended bill and subsequently, on the — day of October 1908 the said demurrers were overruled and a certain pleas of res adjudicata was acted upon as fully appears from the record in this case.

And thereafter on or about the — day of December 1908, the said Mary H. Murray appeared and answered the said original and amended bills. Subsequently certain depositions were taken on behalf of the plaintiff to be read and considered in this cause.

The said complaonant respectfully shows your honor that as appears in the answer of Mary H. Murray to the said original and amended bills she specially pleaded the statute of limitations to the demand of the plaintiff set out in said original bill.

And your complainant being advised that under the rules of practice and pleading of this honorable court, it is proper that he should file this, his amended bill as to so much of the defendants' answer as sets up and pleads the statute of limitations to the plaintiff's demand as aforesaid, avers:

First. That the said Mary H. Murray, by indirect ways and means has obstructed the prosecution of complainant's right in this: that the said Mary H. Murray, intending to deceive and defraud

complainant, induced him to believe in and to rely upon a certain contract in writing had and made between this complainant and Emily Hollingsworth, bearing the date of July 10th, 1875, which contract is in the words following:

"MEMO.—Of contract between Emily Hollingsworth of the city of Philadelphia of the one part and John E. Roller of Rockingham County Virginia, of the other part. Witnesseth that John E. Roller undertakes to recover *from* Emily Hollingsworth the tract of about 52,000 acres lying in Rocking- and Augusta Counties Virginia and Pendleton County West Virginia being the tract of land conveyed to John Coulter, surviving trustee of Paschel Hollingsworth by and of Henry Hollingsworth and others in 1852 now duly of record in all of said counties and which was sold during the late war by John R. Koogler, Sheriff of Rockingham, for an alledged delinquency of taxes and purchased by Jacob Dundore * * * upon the following terms viz: Emily Hollingsworth agrees to pay all taxes in arrear to this date and to pay all expenses that may be incurred in the expected litigation outside of Virginia. All expense in Virginia of the litigation that may be necessary and expenses of any sale that may be made are to be paid out of the proceeds of the lands recovered. Emily Hollingsworth *in* to be at no time required to pay any money for anything connected with the litigation in Virginia. If these expenses are paid by John E. Roller he is to be reimbursed out of the *por*ceeds of the lands recovered. Emily Hollingsworth agrees to convey to John E. Roller one-fifth of all lands recovered by him, he agreeing however to bear his proper proportion of the expenses of the litigation. Emily Hollingsworth is not to make any sale of her part of the lands recovered which will prejudice the right of John E. Roller.

(1) The Loose tract of 13,800 acres part of the above tract of 52,000 acres has already been adjusted and settled save some expenses of recording deed, &-., &c.

(2) The Davis tract of 2,700 acres part of the same land has been bought in for Emily Hollingsworth at fifteen cents per acre upon the following terms, viz:

1. Emily Hollingsworth in not to be liable personally nor any of her property outside of Virginia rendered chargeable directly or indirectly for the purchase money.

2. The property purchased to stand as security to Roller for her proportion of the purchase money if Roller pays it, or in the Settlement of the proceeds of any of her property Roller will be allowed the amount contributed for her with interest.

3. Emily Hollingsworth agrees to unite with Roller in a sale of the whole of that particular tract whenever — finds a purchaser at a price for which he is willing to sell his share.

4. The Gray J. Payton tract of 10,075 acres in West Virginia has also been settled and adjusted save perhaps some costs of recording deed, &-., &c.

Witness the following signatures and seals, this 19th day of July, 1875.

(Signed) EMILY HOLLINGSWORTH. [SEAL.]
(Signed) JOHN E. ROLLER. [SEAL.]

as defining the terms and conditions under which she was bound to make compensation to your complainant for the services rendered by him and described in his original bill, the fact, being that on or about the first day of April, 1889, at the time the said Emily Hollingsworth conveyed a portion of the land in the bill described to Mary H. Murray, said conveyance was in consideration of, and upon the condition that she the said Mary H. Murray, should pay to your complainant one-fifth of the proceeds thereafter to be realized on the sale of the lands and that she should hold the same as trustee for your complainant as in the original bill aver-ed, and your complainant avers that from that time until the 25th day of May, 1901, the said Mary H. Murray held herself out to *to* your complainant as bound by the terms of said contract: that she would faithfully and honestly execute and carry out the same in fact, partly executing and carrying out the said agreement based upon said contract; paying your complainant considerable sums of money in accordance with her said promise, and after your complainant had instituted suit in 1893, in the Circuit Court of Rockingham County in the State of Virginia for the purpose of asserting his rights against the said Mary H. Murray, she induced your complainant to withdraw his said suit, by agreeing to pay your complainant one-fifth of the proceeds of the purchase money owing by George A. Wheelock on his purchase price of the Hollingsworth lands as the reasonable compensation of your complainant for his services aforesaid; and thereafter insisting upon the same as in force between your complainant and declaring that she was bound thereby and would faithfully perform and carry out the same.

And your complainant avers that relying upon said promises, agreements and conduct of the said Mary H. Murray he did not prosecute his said suit, but withdrew the same and did not institute any other at any time, until about the 25th of May, 1901, when he instituted his suit in Rockingham County, State of Virginia, when, for the first time the said Mary H. Murray repudiated her promise and undertakings by means whereof as your complainant avers, he has been fraud-lently obstructed in the prosecution of his rights and was induced not to prosecute said suit for the enforcement thereof.

Second. And your complainant avers that by reason of said promises, acts and conduct if the said Mary H. Murray after having induced your complainant to act as aforesaid, she is estop-ed in a court of equity from availing herself of any statute of limitations as against the claim of your complainant as set up in said original bill, and has no right to plead the same to the demand of the complainant.

Third. Your complainant further avers that while the said agreement of July 10th, 1875, provides for a conveyance to your complainant of a one-fifth on all the lands recovered by him, nevertheless after the conveyance of the said land in April, 1889, by Emily Hollingsworth to the defendant Mary H. Murray and after she had promised and undertaken as is alledged in complainant's original bill and his said amended bill, the said Mary H. Murray insisted

that complainant should receive one-fifth of the net proceeds arising from the sale of the land, instead of a conveyance to him thereof, and your complainant acceded thereto, and thereafter continued to act and rely upon the same, and your complainant avers that under this agreement made and entered into at the request of said Mary H. Murray no cause of action arose, or accrued to him until there was a sale of the land and the proceeds thereof received or could have been received by the said Mary H. Murray.

And your complainant further avers that this agreement as to the time of payment to your complainant of the compensation for his services aforesaid, being dependant upon the sale of the land and the receipt of the purchase money, by the use of due diligence, no cause of action accrued to him until, the said sale and receipt, as aforesaid of said purchase money by the said Mary H. Murray.

And your complainant further avers that until the said Mary H. Murray in January, 1901, conveyed the lands to the Chesapeake Western Company, the said Wheelock not having previously paid his said purchase money, he was not entitled as between himself and the said Mary H. Murray to receive of the said Mary H. Murray payment of his compensation out of the proceeds arising on the sale to the said Wheelock at which time the said Mary H. Murray undertook the responsibility of releasing Wheelock and selling the land for very much less than its value without the knowledge and consent of your complainant, whereupon cause of action arose and accrued unto complainant.

And your complainant avers that the said Mary H. Murray thereby became and was trustee for your complainant of the one-fifth of the proceeds of the purchase money due by Wheelock, as aforesaid, and became liable to pay the same to you- complainant, and complainant's right to have and demand and receive the same arose and accrued.

Fourth. Your complainant further avers that after the conveyance of said land in April, 1889, by Emily Hollingsworth to Mary H. Murray he continued to render and did render valuable services to the said Mary H. Murray in the perfection and protection of her title to said lands, and such services continued until some time in 1893, and the said Mary H. Murray promised your complainant to pay to him the reasonable value thereof out of the proceeds arising on the sale of said lands, conveyed to her as aforesaid, as soon as the sale thereof should be made, and the purchase money thereof received, and complainant avers that a sale of said land was made to George A. Wheelock in December, 1892, and that the purchase money therefore was received or ought to have been received by said Mary H. Murray in January, 1901, on the re-sale of the said land to the Chesapeake Western Company at which date the said Mary H. Murray became liable to your complainant and complainant's right to have demand and receive from her the sums demanded in complainant's original and amended bill arose and accrued.

Fifth. Your complainant further avers that about the time of the repudiation in May, 1901, by Mary H. Murray of her promises and undertakings, as aforesaid with your complainant he instituted

a certain suit in equity entitled John E. Roller, vs. Mary H. Murray in the Circuit Court of Rockingham County, Virginia, the record of the cause is now on file in this cause, from which it will appear that prior to the repudiation by the said Mary H. Murray in May, 1901, of the promises and undertakings on the part of Emily Hollingsworth which she had agreed to carry out, the said Mary H. Murray, relied upon and executed in part the contract embodied in the paper writing signed by Emily Hollingsworth and your complainant bearing the date of the 19th day of July, 1875, and hereinbefore recited, and while the fact is that differences arose between your complainant and Mary H. Murray as to their respective rights and duties under this contract and touching the construction and execution thereof nevertheless both your complainant and Mrs. Murray relied upon the said contract as embodying the rights and duties respectively of your complainant and Mary H. Murray, except in so far as the same had been modified by mutual consent, as aforesaid.

And your complainant avers that until the 25th day of May, 1901, the said Mary H. Murray acknowledged herself bound by said contract as modified by her as hereinbefore set out and promised to execute and carry out the same and your complainant accepted and relied upon said promise and now avers and charges that so long as neither the said Mary H. Murray nor himself made any objection to the agreement and did not repudiate the same, but continued to rely thereon and execute the same no cause of action arose to your complainant to have, demand, and receive from the said Mary H. Murray, just and reasonable compensation for the services tendered in and about the recovery of the said tract of land and of the protection of the title of the said Mary H. Murray, as hereinbefore alledged and your complainant avers that the said Mary H. Murray did not repudiate the same until the 25th day of May, 1901, by means whereof at said date your complainant, became and was entitled to receive payment for his services as aforesaid, and cause of action arose to him therefore for the sum demanded in his said original and amended bill.

In consideration of the premises and being remediless save in a court of equity where matters of this sort are alone and properly cognizable, complainant prays the said Mary H. Murray may be required to answer this bill, answer under oath being waived: that complainant may have leave to file this amended bill: that the relief heretofore prayed in his original and amended bill may be granted and that the complainant may have all such other, further, and general relief as the nature of the case requires or as in equity may seem meet.

And he will ever pray, etc.,

JOHN E. ROLLER.

STATE OF VIRGINIA,
County of Rockingham, To-wit:

This day personally appeared before me, Gilbert R. Spitzer, a Notary Public in and for the County of Rockingham, in the State

of Virginia, John E. Roller, the complainant in the foregoing amended bill, and made oath before me in my said county, that the allegations contained therein, so far as made on his own knowledge are true and those made on the information derived from others he believes to be true.

Given under my hand this 3d day of December, 1909.

GILBERT R. SPITZER, *N. P.*

* * * * * * *

In the Circuit Court of Pendleton County, West Virginia.

In Chancery.

JOHN E. ROLLER, Complainant,
vs.
MARY H. MURRAY & Others, Defendants.

This cause came on the 26th day of July, 1910, to be heard upon the papers heretofore read and the proceedings heretofore had, the depositions of witnesses and exhibits therewith, and the cause was regularly submitted upon the merits and was argued by counsel, on consideration whereof, the Court being of the opinion for reasons stated in writing and made part of the record in this cause, that so much of the decree of September 30th, 1908, as adjudged that the judgment of the Circuit Court of Rockingham County, Virginia, dated June 24th, 1907, thereafter affirmed by the Supreme Court of Appeals of Virginia on November 27, 1907, vouched with the plea of res adjudicata filed by the defendant was not final and conclusive upon the plaintiff as set out in said decree of this Court of September 30th, 1908, was erroneous, thereupon, the defendant Mary H. Murray, moved the Court to re-hear the said decree of this Court rendered on the 30th day of September, 1908, and prayed the Court for leave to file her petition to re-hear the said decree in this cause, and thereupon the plaintiff objected to the filing of said petition to rehear said decree and the cause was argued by counsel, upon consideration whereof the court doth overrule the objections of said plaintiff to said motion of the defendant, and doth allow the motion of said defendant to file said petition to rehear the decree of September 30, 1908, and thereupon the said petition was filed in open court, and thereupon the cause came on further to be heard on the record of this cause and the petition of Mary H. Murray to rehear said decree as aforesaid and the objection of the plaintiff thereto, upon consideration whereof and the argument of counsel the Court doth adjudge, order and decree that the said decree of September 30th, 1908, be re-heard, and the Court being of opinion that the said decree was erroneous in so far as it declared "that the judgment of the Circuit Court of Rockingham County, Virginia, dated June 24th, 1907, affirmed by the Supreme Court of Appeals of Virginia, on November 21, 1907, vouched with

said plea of res adjudicata filed by the defendant as aforesaid, is final and conclusive upon the plaintiff, as to the estate of Mary H. Murray within the jurisdiciton of the State of Virginia, but is not final and conclusive upon the plaintiff as to any estate of Mrs. Murray in the jurisdiction of this Court, doth accordingly order that said plea of res adjudicata be rejected and disallowed in so far as the same is inconsistant with this ruling: and the Court doth adjudge, order, and decree, that that portion of the said decree of September 30th, 1908, above recited, be and the same is hereby set aside and declared null and void.

And the Court being of the opinion that the said plea of res adjudicata was a good and sufficient plea and defense *in* the Complainant's bill, both in form and substance, and it appearing from the exhibits filed with the pleadings, together with the aggregation of complainant's pleadings that the said plea was true and good in point of fact and the opinion of the complainant to strike out the plea is overruled and the plea is sustained and found and adjudicated to be true in point of fact and is adjudged to be a complete defense to the demand by the complainant set up and asserted in his bill of complaint, *and* it is *true*, therefore adjudged, ordered, and decreed that the complainant take nothing by his said bill and the same is dismissed, and the defendant Mary H. Murray, recover of the complainant, John E. Roller, her costs in this behalf expended with leave to sue out execution for same.

The plaintiff moves the Court to insert in the foregoing decree before the word set-up and asserted in the bill of complaint in the latter part of said decree the following words "and enforceable under the laws of this state," which the Court refused to do.

* * * * * * *

IN THE

Supreme Court of the United States

October Term, 1913

No. 966

JOHN E. ROLLER, Plaintiff in Error

vs.

MARY H. MURRAY et als, Defendants in Error

On motion by Mary H. Murray, Defendant in Error, to Dismiss or Affirm.

Note of Argument for the Plaintiff in Error, John E. Roller

THIS MOTION IS SUPPORTED VERY UNSATISFACTORILY

1. By extracts from the transcript of the record, selected by Mary H. Murray.

2. By a printed petition and note of argument on behalf of Mary H. Murray signed by Holmes Conrad and Edward S. Conrad, her counsel.

It will be noted that the petition of the Plaintiff in Error for a writ of error, the supplement thereto, and the further supplement thereto, the assignments of error, and most important parts of the record, are not printed, and the Court is left to grope its way, through the *disjecta membra* of the record, in whatever condition it may happen to find them.

By omitting the important parts of the record which cover the questions, under which the writ of error was sought, as well as the assignments of error, set forth in the petition for the writ of error and by incorrectly stating the positions taken therein by the plaintiff in error, opposing counsel have sought to make a case upon which to base a motion to affirm or dismiss the writ of error, on the ground that "it was taken for delay only" and that the "question on which jurisdiction depends is so frivolous as not to need further argument."

(*Memo.*—Further and necessary parts of the record have since been printed by the order and at the expense of the plaintiff in error.)

THE FEDERAL QUESTIONS PRESENTED TO THE COURT

I

The petition and supplement thereto and the further supplement to the petition for the writ of error together with certain important parts of the record now printed and filed herewith, all of which must be read by the Court, present three assignments of error.

First: That the Supreme Court of Appeals of West Virginia had erred in holding that the plea of *res adjudicata* filed by the defendant, Mary H. Murray, in which she relied upon the decree of the Virginia Court—the Circuit Court of Rockingham County, June 24th, 1907, affirmed by the Court of Appeals, Virginia, on the 21st of November, 1907—was a good and sufficient plea and defense to the demand of the plaintiff in error, Roller, set up in his Bills of Complaint, in the West Virginia Court, for the reason that the Virginia Court had provided that the same should be without prejudice to the right of the petitioner, Roller, to institute other proceedings upon a *quantum meruit* and that the records showed that the cause of action and grounds of jurisdiction and relief were not the same

in the West Virginia cause, as those set out and contained in the record in the cause in the Virginia Court, but was based upon a demand for a *quantum meruit* for reasonable compensation for services rendered by the petitioner, Roller.

The case in West Virginia was a suit in equity, under the Statutes of that state, to attach and subject that part of the "Hollingsworth" Survey, which lies in the County of Pendleton, in that state, to the payment and satisfaction of the demand of the complainant, for compensation for services rendered by him in and about the recovery of the tract of land in controversy, and the contention was that the West Virginia court had denied the plaintiff in error "due process of law" in holding that the contract was the same as that which had been passed upon in Virginia, and had no greater validity or force in the courts of West Virginia than they had in Virginia, when plead or proven and had given full faith and credit to the decree of the Virginia Court holding the contract in controversy to be invalid and enforced the same in the courts of that state.

(A) The first averment under this assignment of error was that the contract in controversy must be held to be a Pennsylvania contract, and that its validity and enforcement in the Courts of West Virginia did not depend upon the decision of the Virginia courts, but demanded an independent and separate consideration of the matter in West Virginia, and the courts of that State, by their failure to give such independent and separate consideration and determination of the question as to the validity and rights of enforcement in that State, had failed to give due process of law to the plaintiff in error and when it applied the decision of the Virginia Court to the determination of the question in the State of West Virginia and enforced the decision and determination of the Virginia Court, it deprived the plaintiff in error of his right of action in the West Virginia courts, without due process of law.

(B) The second averment under this assignment of error was, that the written contract of 1875 shows on its face that the terms thereof, so far as it related to the State of West Virginia, and the property that was in the jurisdiction of that state, and the contract rights under the laws of that state, were wholly and vitally different from what they were as to the State of Virginia, and that the West Virginia court in holding that they were the same and in refusing to recognize the contract as a West Virginia contract, and the right of the plaintiff in error to have its validity and right of enforcement determined by the courts of that state, deprived the plaintiff in error of such right in the West Virginia Courts without due process of law.

SECOND: Upon the second assignment of error, it was submitted that the plaintiff in error, Roller, had been denied DUE PROCESS OF LAW IN THE VIRGINIA COURTS IN THIS THAT THE CIRCUIT COURT OF ROCKINGHAM COUNTY, THE INFERIOR COURT OF THAT STATE, HAD ARBITRARILY AND UNLAWFULLY REJECTED HIS THIRD AMENDED BILL, TENDERED TO THAT COURT IN MARCH, 1907, AND THAT THIS ACTION HAD BEEN AFFIRMED BY THE SUPREME COURT OF APPEALS OF THAT STATE ON THE 21st OF NOVEMBER, 1907.

Upon this ground the plaintiff in error, Roller, especially insisted upon his right to a writ of error, to the decree of the Supreme Court of Appeals of West Virginia, upon the ground that that court had erred in its analysis of the proceedings had before the court in Virginia and the decision of that court, in that, it said:

> "here, the plaintiff had been allowed a hearing.
> "He had filed an original and two amended bills
> "and had no doubt had an opportunity to tender
> "the third amended bill long before the submis-
> "sion of the cause. It is certainly competent for

"a court to say, within reasonable limits, what "amounts to a compliance with its rules and the "principles of law, respecting the order and lim- "itations of proceedings in a case. Besides in the "opinion of the court the proposed amendment "would not have changed the character of "plaintiff's claim, nor relieved the contract of "its infirmity. An erroneous decision in respect "to either of these matters would not amount to a "denial of due process of law. As to them, it is "not a case in which the plaintiff had no day in "court."

And, it was submitted that the proceedings had, were not such as the West Virginia Court declared them to be but that the proceedings had and the decree rendered in the Virginia Court, were illegal and void being in violation of the law of due process, under the Fourteenth Amendment of the Constitution of the United States, and that the West Virginia Court also denied the plaintiff in error due process of law, in enforcing the Virginia decree.

If this were the only Federal question presented in the record it might be possible that the Court would entertain and listen to the argument upon a motion to dismiss or affirm.

But even this question is one which would not be lightly disposed of, because it will come before the court many times in the future, and it will never be decided to the satisfaction of the great body of the people of the land, until the right and province of this court to interfere in every case of such judgments and to declare their invalidity has been recognized and acclaimed. This question will be argued further on, in this brief. It is argued also in the petition for the writ of error.

THIRD: Upon the third assignment of error it was submitted to the court that the Court of Appeals of West Virginia had refused to give "full faith and

credit" to the defence or reply of *res adjudicata,* made by the plaintiff in error, Roller, to the plea of *res adjudicata,* which the defendant in error, Mary H. Murray had filed in the cause, based upon the decrees which had been rendered in the first cause of Roller by the plaintiff in error, Roller, to the plea of *res adjudicata* of the plaintiff in error, Roller, being based upon the record of the cause of Chesapeake-Western Company vs. John E. Roller et als, which had been also decided in the Virginia Courts.

The West Virginia Court either overlooked or arbitrarily disregarded the facts shown by the record in said last named cause—a complete transcript of which had been used in the court below and had been made a part of the record, also, by agreement of parties at the hearing of the cause, upon the appeal, in the West Virginia Court, at Wheeling in June, 1911.

The opinion of the Supreme Court of Appeals of West Virginia, of October 1912 on this question is based entirely upon the view that the decree in that cause copied into the printed record did not show a final adjudication upon the merits either in terms or legal effect and that a decree merely dissolving an injunction might not carry any implication of a determination upon the merits, but being interlocutory, merely the order of dissolution presumptively did not go to the merits.

The complete transcript of the record in the cause of Chesapeake-Western Company vs. John E. Roller et als, upon which the cause was heard in the West Virginia Court, now a part of the record, before the court shows that no effort was ever made in that cause to reinstate the injunction, which had been dissolved by the decree of October 10th 1907, but that the cause was set down for hearing in vacation on the other branch of the injunction, which had nothing whatever to do with that part of the decree, which enjoined the petitioner, Roller, from prosecuting his suit in the West Virginia Courts,

and on the 1st of August, 1908, dismissed the cause without any reservation whatever.

So that it cannot possibly be said that there was not a final hearing of that cause, upon the merits, or that not a final decree—one from which an appeal could be taken since it was shortly thereafter made final, forever, by a decree of the court dissolving the second branch of the injunction order, awarding costs and striking the case from the docket.

II

ARGUMENT UPON THE SUFFICIENCY OF THESE ASSIGNMENTS OF ERROR:

PRELIMINARY STATEMENT:

The rule as to the jurisdiction of the Supreme Court of the United States, is thus stated, by Mr. Justice Harlan: "It is essential to our jurisdiction in "re-examining the judgment of the State courts "that the alleged conflict between the State law and "the constitution of the United States appear in "the pleadings of the suit, or from the evidence "in the course of the trial, in the instructions asked "for, or from exceptions taken to the rulings of "the court, OR IT MUST BE THAT SUCH A "QUESTION WAS NECESSARILY INVOLVED "IN THE DECISION, and that the State Court "would not have given a judgment without de- "ciding it."

The authorities cited in support of this proposition are as follows, to wit; Home for Incuribles v. New York City, 187 U. S. 155 ; 157 ; 47 L. Ed. 117, re-affirmed in St. Louis Expanded Metal, etc. Co., vs. Standard Fireproofing Co., 195 U. S. 627, 49 L. Ed. 351 ; Stuart v. Hauser, 202 U. S., 585, 51 L. Ed. 328, citing Parmelee v. Lawrence, 11 Wall. 36, 38, 20 L. Ed. 48 ; Lawler v. Walker, 14 Howard 149, 152, 14 L. Ed.

364 ; Railroad v. Rock, 4 Wall 177, 18 L. Ed. 381.

In Arrowsmith v. Harmoning, 118 U. S. 194, it is said:

"This court has jurisdiction, in error, over a judg-
"ment of the Supreme Court of a State when it
"necessarily involves the decision of the question,
"although raised in that appellate court for the
"first time, and not noticed in its opinion, whether
"a statute of the State conflicts with the Constitu-
tion of the "United States."

I

FIRST ASSIGNMENT OF ERROR.

CLAUSE A: In Pritchard vs. Norton, 106 U. S., 124: —It was held; that the validity of such a contract as that in controversy here was not a matter of *procedure* to be determined by the *lex fori*, but that it belongs to the *lex loci* of the contract and must be determined by the law of the seat of the obligation and that in every forum a contract is governed by *the law, with a view to which it was made* because *that law* becomes *a part of the agreement* and lastly that it is presumed

"that the parties had in contemplation a law ac-
"cording to which their contract would be upheld
"rather than one by which it would be defeated."

The Court, in its opinion, lays down the following principles, as applicable in such cases:

"The law we are in search of, which is to decide up-
"on the nature, interpretation, and validity of the
"engagement in question, is that which the parties
"have, either expressly or presumptively, incor-
"porated into their contract as constituting its ob-
"ligation. It has never been better described than
"it was incidentally by Mr. Chief Justice Marshall
"in Wayman v. Southard, 10 Wheat, 1, 48, where
"he defined it as a principle of universal law—
"The principle that in every forum a contract is

"governed by the law with a view to which it was "made." The same idea had been expressed by "Lord Mansfield, in Robinson v. Bland, 2 Burr. "1077, 1078. "The law of the place" he said, "can "never be the rule where the transaction is entered "into with an *express* view to the law of another "country, as the rule by which it is to be governed."

"The same author concludes his discussion of "this particular topic as follows: "As all the fore- "going rules rest upon the presumption that the "obligor has voluntarily submitted himself to a par- "ticular local law, that presumption may be re- "butted, either by an express declaration to the con- "trary, or *by the fact that the obligation is illegal "by that particular law, though legal by another.* "The parties cannot be presumed to have contem- "plated a law which would defeat their engage- "ment." 4 Int. Law. sect. DCLIV. pp. 470, 471."

The Syllabus of this case says: "It is therefore to be presumed, in the absence of any express declaration or controlling circumstances to the contrary, that the parties had in contemplation a law according to which their contract would be upheld, rather than by one by which it would be defeated."

The same principle is to be found in 2 Wharton on Conflict of Laws 944, "LAW FAVORING CONTRACT TO BE PREFERRED."—"It is laid down by Eichhorn that when "there are several possible laws, that is to be ap- "plied which is most favorable to the contract; "and in cases where there are varied local forms "for the consummation of a contract by corres- "pondence, this is specifically provided by the "Prussian Code. Savigny supports this position so "far as to declare that when a contract would be "valid by the law of the domicil, but invalid by the "place of contract, it is to be presumed that the "parties intended to be bound by the law of domicil. "And such, it has been argued, is the position of the

"English common law. It is always to be pre-
"sumed that persons agree effectually to do that
"which they contract; and if so, this agreement
"becomes part of the contract, overriding such
"local law as does not rest on a ground dis-
"tinctively moral or political. And when there is a
"conflict of possible applicatory laws, the parties
"are presumed to have made part of their agree-
"ment that law which is most favorable to its per-
"formance. The authorities cited in support of
"this doctrine, are as follows, to wit:

> Wharton, Ev. Sec. 1250 ; 2. Parsons, Contr. 95 ; 2 Kent. Com. 460 ; Westlake, Private International Law (1858), Secs. 203-207 ; R. v. Hellman, L. R. 2 Eq. 363 ; 14 Week, Rep. 682 ; Cromwell v. Sac County, 96 U. S. 51, 24 L. Ed. 681 ; Cutler v. Wright, 22 N. Y. 472 ; Kilgore v. Dempsey, 25 Ohio St. 413, 18 Am. Rep. 306; Kenyon v. Smith, 24 Ind. 11 ; Smith v. Whittaker, 23 Ill. 367 ; Arnold v. Potter, 22 Iowa, 194 ; Talbott v. Merchant's Despatch Transp. Co., 41 Iowa 249, 20 Am. Rep. 589 ; Baldwin v. Gray, 4 Mart. N. S. 192, 16 Am. Dec. 169; Saul v. His Creditors, 5 vol. II Confl. of Laws —60.

If this principle be applied then the plaintiff in error, Roller, had a vested right under his contract to have the law of Pennsylvania applied in the West Virginia court, and that law as has been shown in the petition for the writ of error is in favor of the validity of the contract.

If on the other hand the court should hold that the place for the performance of the contract—the *lex loci solutionis* should be the law of the case, then it would be the law of the State of West Virginia and the Supreme Court of Appeals of that State admits in its opinion that under the law of that state, there is no such

thing as Champerty, and the Plaintiff in Error had the vested right under his contract, to have the law of that state applied, as being the *lex loci solutionis.*

In U.S. v. Central Pacific R. R. Co., 118 U.S. p. 235, it is held, that the court is bound, if possible, so to construe the law, as to leave the contract open to neither objection. If one is lawful and the other is unlawful, the former must be adopted.

> Citing Broughton v. Pensacola 93 U.S. Sec. 266; Red Rock v. Henry, 106, U. S. 596; Hobbs v. McLean, 117 U. S. 597, decided at the present term, and cases there cited ; United States v. Coombs, 12 Pet. 72.

Chief Justice Marshall has defined it as a principle of universal law :—

> "The principle that in every forum a contract is "governed by the law, with a view to which it was "made."

In Pinney v. Nelson, 183 U. S. p. 148, there is a long quotation from the opinion of the court, in Pritchard v. Norton, approving the principles, which were illustrated and enforced in that case.

So that it is clear that the law of the place of performance, as to all matters connected with its performance, governs the contract, but that the general principle also is that the place where the contract is made governs the contract; but if there be two rules of construction, to wit: the law of the place where the contract is made, and the law of the place where it is to be performed, the parties are held to have contracted with a view to that law which will validate the contract, and not with the view to the law which will make it illegal and void, and the contract will be governed by the law of the place where it is valid.

It follows from these principles that the plaintiff in error, Roller, had a vested right to have his contract

construed by the West Virginia Courts to be either a Pennsylvania contract or a valid West Virginia contract, and that such right was "legally and completely vested" in him.

Now to deprive him of such vested right, was as was said by the court IN EFFECT TO TAKE AWAY ONE MAN'S PROPERTY AND GIVE IT TO ANOTHER AND THE DEPRIVATION WOULD BE WITHOUT "DUE PROCESS OF LAW."

See Osborne v. Nicholson, 13. Wal. 654—662.

II

THE SECOND ASSIGNMENT OF ERROR.

The argument upon this assigument of error is given quite fully in the petition for the Writ of Error and the supplement and further supplement thereto, and two important questions are presented to the court:

First: Did the Court of Appeals of West Virginia err in its analysis of the proceedings had before the court in Virginia, and of the decision of that court?

The West Virginia Court enforced the decree of the Virginia court, under the "full faith and credit" clause of the Constitution of the United States and because as it said the plaintiff in error, Roller, had been allowed a hearing in the Virginia Court, and that that court had the right to refuse his offer of a third amended bill, because he had had an opportunity to tender it, long before the submission of the cause, and moreover it would not have changed the character of the plaintiff's claim nor relieved it of its infirmity. But in making these statements and arriving at these conclusions, it arbitrarily overruled the case of the plaintiff in error, Roller, as presented in that record, in this that it failed to pass upon the question presented by the record, as to whether or not the Virginia court had the right to refuse to allow the third amended bill to be filed which would have compelled that court to change its ruling and would have relieved the contract of the plaintiff

in error, of its alleged infirmity—that of champerty, and by unjustly and erroneously assuming these to be the facts, denied the plaintiff in error "due process of law."

It will be observed that it is the deductions and conclusions of the West Virginia court from the record of the Virginia court and the decision of the West Virginia court upon these deductions, that is complained of as not being due process of law.

SECOND: But the second and most important question presented by this assignment of error, is as to the effect which the courts of the state, and your honor's court, must give to the judgment of a state, which has been obtained without due process of law, when the record discloses the fact. The decision of this question however, is not essential to the decision of the present case.

In other words suppose the record has disclosed the fact that a judgment has been obtained by a violation of the law of due process e. g. in a case in which a decree had been gotten in a Court of Chancery, when a Court of law alone had jurisdiction, or suppose a defendant had been arbitrarily excluded from making a defense in a case in which he had a valid and substantial defense or take any other of the cases, in which from time to time, such arbitrary and despotic action had been had, as in effect to deprive one man of his property and give it to another—have such judgments any *validity or force* or are they void?

They are clearly illegal ; they have been obtained in violation of the Supreme Law of the land—the Fourteenth Amendment due process of law: Are they not void in every forum?

Such a conclusion follows logically and surely from well recognized principles, and would make the Fourteenth Amendment what it was intended to be and what in fact it is, the palladium of liberty, for the minority in every walk and condition of life.

The principle for which it is contended under this assignment of error, is one recognized by the Court the principle being thus stated in 23 Cyc. p. 998.

> "That the contract or cause of action was illegal, "immoral or contrary to public policy, is good "ground for enjoining the enforcement of a judg- "ment."
>
> "It is generally held that equity may properly "enjoin the enforcement of a judgment" which is "absolutely and entirely void, especially if the "judgment is regular on its face and does not dis- "close the grounds of its invalidity" citing numer- "ous cases. See 23 rd. Cyc. 992.

In Kentucky, under a statute providing that neither party under a champertous contract, shall have any right of action thereon, it was held that in a collateral proceeding, a judgment may be attacked because of Champerty. See 23 Cyc. 1072 note 14, citing two cases from Kentucky.

In Laing v. Rigney, 160 U. S. 530, 538, it was *argued* that the judgment sought to be enforced in that cause was invalid as having been obtained without due process of law, and the Court recognized this defence as a proper one and considered it upon the facts, although it decided the case against the defendant in error, upon the merits, the court holding, that the claim of the defendant that he had had no hearing, was not sustained by the record, but that it might fairly be said that HE HAD BOTH AN OPPORTUNITY TO BE HEARD AND WAS HEARD.

It is manifest that the court would have held that the defendant in that cause was not bound by that judgment, if it had appeared that he had not had the opportunity to be heard and was not heard and this case is now quoted by the textwriters, in support of the proposition that if a judgment has not been obtained by due process of law, it is absolutely void.

Logically what else could be said in regard to it?

In Wisconsin v. Pelican Insurance Co. 127 U. S. p. 292, it is said:

"The essential nature and real foundation of a "cause of action are not changed by recovering "a judgment upon it; and the technical rules, "which regard the original claim as merged in "the judgment and the judgment as implying a "promise by the defendant to pay it, do not pre- "clude a court, to which a judgment for affirmative "action, (while it cannot go into the validity of the "claim,) from ascertaining whether the claim is "really one of such a nature that the court is au- "thorized to enforce it."

Louisiana v. New Orleans, 109 U. S. 285, 288, 291; Louisiana v. St. Martin's Parish, 111 U. S. 716; Chase v. Curtis 113 U. S. 452, 464; Boynton v. Ball, 121 U. S. 457, 466."

In Fauntleroy v. Lum, 210 U. S. p. 242 Justice White in the dissenting opinion, before the members of the court, used the following language: "Certainly if "such was the purpose of the framers in regard to "the clause referred to, a like purpose must have "been intended with reference to the due faith and "credit clause. If a judgment for a penalty in "money rendered in one State may not be enforced "in another, by the same principle a judgment ren- "dered in another State, giving to the party the re- "sults of prohibited and criminal acts done in an- "other State, is not entitled to be enforced in the "State whose laws have been violated."

III

THE THIRD ASSIGNMENT OF ERROR.

Since it now appears in the record before this court that the cause was heard in the Court of Appeals of West Virginia, upon a record embracing a complete transcript of the cause of Chesapeake-Western Co. v.

John E. Roller, et als, there can surely be no question about the fact, that the West Virginia court erred most grievously, in holding that the order of October 10th 1907, which dissolved the injunction, without a dismissal of the bill and in the absence of any demurrer or answer thereto, was not a decision upon the merits and a final adjudication but was merely interlocutory, when it now appears from the complete transcript of the record in said cause that subsequent to the order of October 10th 1907, dissolving said injunction, to wit: on the 27th of June, 1908, some eight months later, the defendant, Mary H. Murray—defendant in error here—filed her demurrer to the bill of complaint in that cause and her answer thereto, in which she admits that she knew of the institution in the Circuit Court of Rockingham county of the suit of John E. Roller v. Wheelock et als. and that that suit was finally disposed of and the cause dismissed; that she knew that the plaintiff in error, Roller, had instituted another suit in the Circuit Court of Rockingham County upon the same cause of action and seeking the same relief and that she had filed pleas of *res adjudicata* and the Statute of limitations in that suit; and that she knew also that the plaintiff in error, Roller, had instituted a suit in West Virginia, involving the same subject matter, setting up the same cause of action, substantially the same facts, and involving the same issues that were involved in the suit that had been decided against him, by the Virginia Court and that it was affirmed by the Supreme Court of Appeals of the State and that she had filed demurrers and pleas to the said bill of complaint in West Virginia and hoped to have that case dismissed also.

SHE DECLARED IN HER ANSWER THAT SHE BELIEVED IT TO BE TRUE THAT THE CIRCUIT COURT OF ROCKINGHAM COUNTY HAD THE RIGHT TO ENJOIN AND RESTRAIN THE SAID PLAINTIFF IN ERROR, ROLLER, FROM PROSECUTING SAID SUIT IN WEST VIRGINIA

AND THAT THE INJUNCTION AS TO THAT SUIT SHOULD HAVE BEEN PERPETUATED, BUT THAT SHE WAS ADVISED THAT BY AN ORDER ENTERED IN THE CAUSE, THE INJUNCTION IN THAT RESPECT HAD BEEN DISSOLVED:

And, thereupon the cause coming on to be finally heard on the 1st day of August, 1908, on the papers heretofore read and proceedings heretofore had, the demurrer and answer of the said Mary H. Murray and upon her motion to dissolve the second clause of the injunction order, that motion was sustained as to the payment to her of $18,000 in bank, and she was awarded her costs against the Complainant—The Chesapeake Western Company, and execution was awarded therefor and the cause stricken from the docket.

So that it cannot possibly be said that the decree of the 10th of October, 1907, in the cause of the Chesapeake-Western Company v. John E. Roller et als. was not an adjudication upon the merits and a final adjudication thereon by a competent Court—having jurisdiction of the subject matter—in a cause in which the same parties were before the court and in which the question being once adjudicated, was forever adjudicated and entitled to full faith and credit in every court in the land.

THE MOTION TO DISMISS OR AFFIRM

It is submitted that the printed argument or petition upon the motion to dismiss or affirm shows upon its face a want of appreciation of the issues presented by the record and fails to state fairly and justly the case presented by the petition for the writ of error and the assignments of error. Surely there is no excuse for this.

All that it states in effect is that the defendant in error wants the decree appealed from, affirmed because she wants it done.

Nor are the authorities cited in that petition relevant.

It is submitted that the case of San Francisco City v. Itsell 133 U. S. p. 65, cited in that petition has no application or bearing whatever upon the question, whether a judgment obtained without due process of law, is illegal and void, or not. It does decide that a Federal question—either in express terms, or by necessary effect—may be decided by the State court against the plaintiff in error so as to give that court jurisdiction to recover it, and is in reality good authority for the plaintiff in error, in the present couse.

It is submitted too, that opposing counsel, as well as the West Virginia Court, have wholly misunderstood and arbitrarily misapplied the law of the case of Fauntleroy v. Lum 210 U. S. p. 230. It does not support the findings of that court, but the *contrary* action.

In that case the Missouri Court sought to enforce the law of the State of Mississippi as they understood and construed that law to be. But the Missouri Court made a mistake in ascertaining and deciding what the law of Mississippi was. Their decision however, made that mistaken view, of the law of Mississippi, the law, in every state, as between the parties to the cause, and forever binding on them. The judgment of the Missouri Court was then sued upon in the state of Mississippi itself and the courts of that state undertook to disregard the judgment of the Court of Missouri.

It was sought in this second suit in Mississippi to invalidate the judgment of the Supreme Court of Missouri in the first suit by showing that the award and the judgment thereon in that state were not binding in Mississippi as not being in acordance with the law and public policy of that state, and the Supreme Court of Mississippi so held, but this court reversed that judgment upon the ground that that question had already been involved in and decided by the judgment of the Missouri Court and having been passed upon by that Court, even if it had erred, in adjudging what was the

law of Mississippi, it was, nevertheless, binding upon all the parties to the cause, as the law of Mississippi and full faith and credit must be given thereto. This court in declaring that the judgment of the Missouri Court should be enforced, and in reversing the judgment of the Mississippi Court, which had refused to do so, held that the Missouri Court of Missouri was not supposed to have made a mistake in ascertaining what was the law of the state of Mississippi. Justice Holmes saying, in the conclusion of his opinion: "In this case the Missouri Court, no doubt, supposed that "the award

"was binding by the law of Mississippi. If it was "a mistake it made a natural mistake."

In the case before the court the courts of West Virginia were not called upon by the plaintiff in error, Roller, to refuse to enforce a judgment of the Virginia Court upon the ground that that court had decided that the contract in controversy either was or was not valid under the laws of West Virginia, but, as has been seen, to decide the question of champerty under the law of its own state, in its own way.

FIRST: In the event the contract in controversy was regarded as a Pennsylvania contract, whether or not it should have been enforced in the Court of West Virginia, or:

SECOND: In the event the contract was to be regarded as one to be performed in the state of West Virginia and the rights of the plaintiff in error, Roller, to be determined by the laws of that state, as the *lex loci solutionis* whether or not it should have been enforced in the court.

In which event, in either case, the court of Appeals of West Virginia had no right to pay any attention whatever to the decree of the Virginia Courts and to give that full faith and credit, but was called upon to decide as to the rights of the defendant in error in the Courts of West Virginia, under one or the other of the two views just presented.

In every case in which Fauntleroy v. Lum, 210 U. S. 235 has been cited, as authority, it has simply been used to illustrate the distinction between a case decided on the merits, even though based upon a mistake of the law and a judgment IN WHICH THERE HAS BEEN A USURPATION OF POWER. In the former case the judgment is conclusive, in the latter it is mere "waste paper."

See Wine v. Morse; 218 U. S. 509.

In the case before the court, the Virginia Court had not undertaken to decide what the law of champerty in the State of West Virginia was and the effect thereof on the contract sued upon in the West Virginia Court, but had merely decided what the law of its own State was.

If it had undertaken in a proper case, to decide what the law of West Virginia was, then such decision, even if the court had made a mistake, would have brought the decision under the principles of the cause of Fauntleroy v. Lum.

But the Virginia Court only decided what the law of champerty was in Virginia and the Court of West Virginia is now found in enforcing the decision of the Virginia Court, in the strange position of having overturned its own course of decision upon this question, it being expressly admitted, in the court's opinion THAT THE VALIDITY OF THE CONTRACT UNDER THE LAW OF THE STATE OF WEST VIRGINIA, viewed independently of the decision, WOULD BE ASSUMED.

The distinction between the case of Fauntleroy v. Lum and the case before the court is made still more noticeable by the distinction which the West Virginia Court has sought to make, in order to sustain its decree, in declaring the law of Virginia, was not penal and that the judgment of the Virginia Court was not for a penalty "inflicted for crimes and misdemeanors but a mere pecuniary penalty for a violation of a municipal

law" quoting Wisconsin v. Pellican Insurance Co. 127 U. S. 265. It cites also the case of Huntington v. Attrill 146 U. S. 657 as to the distinction.

> "Crimes are in their nature local, and the jurisdic-
> "tion of crimes is local. And so as to the rights of
> "real property, the subject being fixed and im-
> "movable. But personal injuries are of the
> "transitory nature, and *sequenter forum rei.*
> "Rafeal v. Verelst, 2 W. Bl. 1055, 1058. Crimes
> "and offences against the laws of any state can
> "only be defined, prosecuted and pardoned by the
> "sovereign authority of that state; and the au-
> "thorities, legislative, executive or judicial, of
> "other states take no action with regard to them,
> "except by way of extradition, to surrender of-
> "fenders to the state whose laws they have violated
> "and whose peace they have broken." Mr. Justice
> "Gray in Huntington v. Attrill, 146 U. S. 657, 669.

The West Virginia Court had failed to notice that the courts of Virginia had inflicted that penalty upon the plaintiff in error, Roller, upon the following distinct ground, to wit:

> "Whatever view be taken in some jurisdictions as
> "to the ground upon which is a champertous agree-
> "ment is held to be void. Whether upon the ground
> "merely that it is not enforceable, or because it is
> "illegal, in most jurisdictions and certainly in this
> "State, such an agreement is considered unlawful
> "and held to be void on that ground. Champerty
> "*is a criminal offence at common law* (Bishop's Cr.
> "Law, 6th ed. secs. 132, 134; 2 Chit. on Contracts,
> "11th Ed. 996; Wald's Pollock on Contracts,
> "293-4.), and the common law as to champerty with
> "respect to the validity of contracts is still in force
> "in this State. Nicholas v. Kane, 82 Va. 312; Rol-
> "ler v. Murray, 107 Va., 344; S. E. 421."

So that the strange anomaly appears that in the West Virginia Court, the plaintiff in error was acquitted of any crime or misdemeanor and that the only penalty inflicted upon him was a mere pecuniary penalty for a violation of municipal law and the decree of the Virginia court was enforced, in that State because of that fact; while in the second case, in the Virginia Court itself, he was denied any recovery, upon a *quantum meruit* upon the ground that champerty was *a criminal offence at common law* and *the common law* was still in force, in Virginia.

If any further argument is needed to convince any reasonable man on earth, that the action of the Courts of Virginia, in denying the plaintiff in error, Roller, the right to file his third amended bill, which would have relieved his claim of all of its infirmity and acquitted him of any suspiciou even of Champerty, since under that bill it could have been shown that prior to the contract under the "McMurtrie letters", which was held to be champertous, there was an agreement that a tract of 13,800 acres of land, the larger part thereof could be and should be made available for the purpose of paying the costs and expenses of the litigation and that it was more than ample for said purposes, was arbitrary and despotic in the highest degree possible.

It is to be further found in the fact that the Virginia Courts have convicted the plaintiff in error, Roller, of a criminal offence and because of that fact, denied him all compensation for valuable and important services and that the West Virginia Court in enforcing the decree of the Virginia Court, decided that the decree did not convict the plaintiff in error, Rolier, of any crime, but simply imposed a pecuniary penalty upon him.

It is submitted moreover, the West Virginia Court erred also in setting aside as the effect of its decision upon the grounds of champerty as held by the Virginia

Court to apply in the case, all that part of the contract between the plaintiff in error, Roller, and Emily Hollingsworth, under whom the defendant in error, Mary H. Murray, claims, which had been executed, by a deed for the share of the West Virginia land actually signed, acknowledged and delivered by the said Emily Hollingsworth to the said Roller. While under well settled principles this could not be done and the vested right, secured thereby defeated overturned, and this also was a want of due process on the part of that cause.

To the flippant this might seem a case of ill luck, but to the serious minded and to the plaintiff in error, himself, it appears the result of arbitrary action—a denial of a just and fair hearing and a refusal of due process.

RESUME

THE ASSIGNMENTS OF ERROR ARE THREE IN NUMBER

FIRST: In that the Court of Appeals of West Virginia, had not recognized the fact that the cause of action and grounds of jurisdiction and relief were not the same in the West Virginia cause, as those set out in the record in the Virginia cause, but that this suit was based upon *a quantum meruit.*

A. First averment under this assignment, was that the contract in question was a Pennsylvania contract, which did not depend for its validity upon the decrees of the Virginia Court, but was entitled to separate consideration and determination by the West Virginia Court.

B. The second averment was that the contract in question was a West Virginia contract, and that the plaintiff in error had a right to have its validity determined by the Courts of that State, and that in either case the West Virginia Court had denied the plaintiff in error, Roller, due process in applying the Virginia

decision to the consideration and determination.

SECOND: In that the plaintiff in error had been denied due process of law, by the West Virginia Court, when it erred in its analysis of the proceedings before the Virginia Court and the decision of that Court and in not holding that the same were illegal and void.

THIRD: In that the Court of Appeals of West Virginia had denied "full faith and credit" to the defense of *res adjudicata,* which the plaintiff in error had interposed in replication to the plea of *res adjudicata* which the defendant, Mary H. Murray, had filed in the cause.

The said replication of *res adjudicata,* by way of replication to the defendant's plea aforesaid, having been based upon a final decree in the cause of Chesapeake-Western Company v. John E. Roller and others.

With the complete transcript of the record of that cause before the court, there can now be no question about the right of the Plaintiff in Error, Roller, to have this Federal question carefully examined and determined by the Court, inasmuch as the record shows that the West Virginia Court had overlooked or refused to consider an important part of that record.

These assignments of error and the questions involved have been argued with as much ability as the plaintiff in error was capable of, and therefore are submitted with absolute confidence THAT THE MOTION TO DISMISS OR AFFIRM WILL BE OVERRULED AND THE CAUSE CONTINUED FOR A HEARING UPON THE MERITS.

JOHN E. ROLLER,
In Propria Persona.

HERBERT W. WYANT,
For Plaintiff in error.

THE LAW OF CHAMPERTY, IN PENNSYLVANIA.

The following statement of authorities will show the Court, that the common law doctrine against Champerty and Maintainance is not in force in the State of Pennsylvania—the State in which the contract was made.

In County of Chester vs. Barber, 97 Pa., State Reports, 453, it was said that the English statute against Champerty was not in force in Pennsylvania.

Judge Ellis Lewis, in his Abridgment of the Criminal Laws of the U. S. treating on Barratry and Maintenance, says:

> "In Pennsylvania the English statute against "maintenance is not in force. Contingent fees to "counsel are of frequent occurrences, many of the "most upright and eminent gentlemen of the bar "have felt no repugnance to this method of com- "pensation. It has been practiced by gentlemen "who have risen to the highest legislative and "judicial stations in the commonwealth, and who "have been distinguished ornaments of the "profession."

In Perry vs. Dicken, 105 Pa., Reps., p. 89, the court quoted these opinions of Judge Lewis with approval.

In the Schoenberger estate, 211 Pa., State R. 104 (1904), one-half of the fund was raised by the sale of real estate to an attorney-at-law, and this real estate was recovered under a contract with the administrator of the estate by which the attorney was to be allowed to receive one-half of the proceeds as a contingent fee.

In the agreement the attorney agreed to bear his half of the costs, or to reimburse the same if he failed, and was not to involve the estate in costs or expenses.

The court in its opinion allowed the attorney his one-half and cited the case of Perry vs. Dicken 105, Pa., p. 83, Mumas' appeal 127 Pa., 114, Stephens estate 161 Pa., 237.

This last case is a much stronger case against the attorney than the one before the court.

ROLLER *v.* MURRAY.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

No. 966. Motion to dismiss or affirm submitted May 25, 1914.—Decided June 22, 1914.

A mere error of law not involving a Federal question and committed in the exercise of jurisdiction by giving conclusive effect to a judgment rendered in another State affords no opportunity for a review in this court.

If the court rendering the judgment had jurisdiction of the subject-matter and the parties, the merits of the controversy are not open for reinvestigation in the courts of another State; but, under the full faith and credit clause of the Federal Constitution and § 905, Rev. Stat., the latter must give the judgment such credit as it has in the State where it was rendered.

The proper method of obtaining a review of the Federal question adversely decided by the state court is by writ of error to this court under § 237, Judicial Code, and not by collaterally attacking the judgment on the ground that it denies due process of law when it is invoked in the courts of another State.

Where the effect of the judgment of another State dissolving an injunction as *res judicata* is denied on the ground that it is not a final decree, if the contention that a final decree was subsequently rendered which concluded the merits was not presented to the court, there is no basis for review in this court under § 237, Judicial Code on the ground that full faith and credit was not given to the original judgment.

Writ of error to review 71 W. Va. 161, dismissed.

THE facts, which involve the application of the full faith and credit clause of the Federal Constitution and the jurisdiction of this court to review a judgment of the state court, under § 237, Judicial Code, are stated in the opinion.

Mr. Holmes Conrad and *Mr. Edward S. Conrad*, for defendants in error, in support of the motion.

Mr. John E. Roller, pro se, and *Mr. Herbert W. Wyant*, for plaintiff in error, in opposition to the motion.

MR. JUSTICE PITNEY delivered the opinion of the court.

This writ of error was sued out under § 237, Jud. Code (act of March 3, 1911, 36 Stat. 1087, 1156, c. 231), in order to bring under review a judgment of the Supreme Court of Appeals of the State of West Virginia (71 W. Va. 161), which affirmed a decree of the Circuit Court of Pendleton County, in that State, in an equitable action brought by plaintiff in error against defendants in error. His original bill was filed May 10, 1901, and an amended bill was filed in December, 1907. Complainant therein averred that in the year 1872 he was employed by the late Emily Hollingsworth, of the city of Philadelphia, as attorney, to recover for her a tract of 52,000 acres of land situate in the counties of Rockingham and Augusta, in the State of Virginia, and the county of Pendleton, in the State of West Virginia, and immediately undertook

the necessary work and labor, and diligently and faithfully endeavored to discharge the duties imposed upon him by the employment; that from time to time various parcels of land were recovered from adverse claimants, some by compromise settlements and others by actions of ejectment, until the entire tract of 52,000 acres was recovered, the actual litigation not being completed until some time in the year 1893; that portions of the property had been sold, so that in the year 1889 there remained of the lands recovered about 44,000 acres undisposed of, from the proceeds of the sale of which complainant was to receive payments on account of his services; that on or about April 1, 1889, the said Emily Hollingsworth made a deed of gift of the unsold lands, amounting to about 44,000 acres, to Mary H. Murray, one of the defendants, upon condition that she should pay to complainant one-fifth of the proceeds thereafter to be realized on the sale of the lands, and that she should hold the same as trustee for complainant, and complainant avers that the said Mary H. Murray accepted said deed upon that condition, and became liable to complainant for the said proportion of said proceeds of sale and for the reasonable value of his services rendered by him to Miss Hollingsworth and to be thereafter rendered to the said Mary H. Murray; that the latter, having accepted the conveyance, continued to act under it and in conformity with it until May 25, 1901, when for the first time she repudiated it. The object of the bill was to enforce a trust as to the undivided one-fifth of the land and of the purchase money upon sales made of the same, as against Mary H. Murray and her grantees with notice. Mrs. Murray pleaded that in a chancery cause brought by the same complainant against her, with others, in the Circuit Court for the County of Rockingham, in the State of Virginia, a court of competent jurisdiction, complainant asserted and claimed that there was due to him from her the same sum of money and the same

debt, as compensation for the same services alleged in his present bill, and that the cause of action was the same as now set up and asserted; that on June 24, 1907, a final decree was made and entered in said cause by the said Circuit Court, and this, on appeal, was affirmed by the Supreme Court of Appeals of Virginia in accordance with opinions found in 59 S. E. Rep. 421 (107 Virginia, 527), in which it was held that defendant Mary H. Murray was a privy in estate to Miss Hollingsworth, her grantor, and a privy also to the contract with complainant, and that the said Supreme Court of Appeals of Virginia, affirming the Circuit Court, determined that complainant had no right to recover on said cause of action, wherefore defendant pleaded the final adjudication of the Virginia court as *res adjudicata*. There was filed with the plea a certified copy of the record of the proceedings had in the Circuit Court of Rockingham County, Virginia, and in the Supreme Court of Appeals of that State. Subsequently, complainant filed in the Pendleton County Court written objections to the plea of *res adjudicata*, upon the following grounds: First, that the Circuit Court of Rockingham County, Virginia, after the rendition of the judgment pleaded by defendant, in another cause pending in that court between the Chesapeake-Western Company and the complainant, John E. Roller, and others, in which latter cause the said Mary H. Murray was impleaded as a party, decreed that the matters involved in the cause pending in the Circuit Court of Pendleton County, West Virginia, were not concluded by the judgment and decree of the Circuit Court of Rockingham County, Virginia, and did therefore vacate and dissolve certain injunctions previously awarded in that cause restraining complainant from further prosecution in the West Virginia court of his present suit against said Mary H. Murray. Secondly, that the cause of action and grounds of jurisdiction and relief in the present cause are

not the same as those set out in the record filed in the plea of *res adjudicata*. And thirdly, that the record and judgment of the Virginia court should not be enforced as *res adjudicata* for the following reasons: (a) that the courts of West Virginia do not enforce foreign judgments that are contrary to the laws and public policy of that State; (b) that the decree rests not upon rights arising *ex contractu*, or upon torts based on natural rights, but upon a penalty denounced by the policy of the law of Virginia which is not so denounced by the policy of the law of the State of West Virginia, and that it is not one of such nature as the courts of West Virginia will enforce; and (c) that the *lex loci rei sitæ* determines the jurisdiction and relief to be given by this court as to the land in the bill referred to, regardless of the judgment of any sister State as to land therein situate.

The Circuit Court of Pendleton County, West Virginia, sustained the plea of *res adjudicata* and dismissed the bill, and it is the judgment of the court of last resort of West Virginia affirming this decree that is now under review.

There are three assignments of error, the substance of which is as follows:

First, that the court erred in holding that the plea of *res adjudicata* filed by the defendant Mary H. Murray was a good and sufficient plea, for the reason that the decree therein relied upon in terms provided that it should be without prejudice to complainant's right to institute other proceedings upon a *quantum meruit* if so advised, and that the record shows the cause of action and ground of jurisdiction were not the same in the present West Virginia action as those set out and contained in the record in the Virginia action; the present action being based upon a *quantum meruit* for just and reasonable compensation for services rendered by complainant in and about the recovery of the tract of land in controversy.

Second, that the court erred in sustaining the action of the court below upholding the plea of *res adjudicata*, because the decrees in the Virginia courts presented in that plea were void and of no effect since they had denied to complainant due process of law, in that they had denied to him the right to file the third amended bill of complaint tendered by him, and denied him a hearing upon the case thereby presented.

Third, that the court erred in sustaining the action of the court below in overruling the objections made by complainant to the plea of *res adjudicata*, because in the suit of *Chesapeake-Western Company* v. *Roller, et al.*, it was necessarily decided that the matters involved in the case in the West Virginia courts were not concluded by the decrees rendered in the first cause of *Roller* v. *Murray* in the Virginia courts.

There is a motion to dismiss or affirm, based upon the ground that no Federal question is raised by the record, or that if any such question is raised it is so frivolous as not to need further argument.

It appears that the Virginia court (107 Virginia, 527), denied relief to complainant with respect to the lands in that State upon the ground that the contract upon which the action was based was champertous, and therefore illegal under the laws of the Commonwealth. The Supreme Court of Appeals of West Virginia (71 W. Va. 161), finding that this decision was rendered not in a mere proceeding *in rem* or *quasi in rem*, but in an action *in personam* (defendants having appeared, and the validity of the contract constituting the basis of the plaintiff's claim to the fund or to the land having been actually litigated by the parties and decided by the courts), that decision necessarily settled and determined the question of the validity of the contract in the State of Virginia, and that under the "full faith and credit" clause of the Constitution of the United States the decision was entitled to the same credit

in West Virginia that it had in the Commonwealth of Virginia. Upon this ground, although assuming that the contract was valid under the law of West Virginia viewed independently of the Virginia decision, the court held itself bound by the Virginia decision to deny relief to complainant.

It is argued under the first assignment of error that the contract in controversy must be held to be a Pennsylvania contract, and that its validity and enforcement in the courts of West Virginia did not depend upon the decision of the Virginia courts, but required an independent consideration upon its merits by the courts of West Virginia, and that their failure to give such consideration was a denial of due process of law. We are unable to find that it was contended in the courts of West Virginia that the contract in question was made in Pennsylvania or ought for other reasons to be regarded as a Pennsylvania contract; nor are we able to find that the "due process of law" clause was invoked in the West Virginia courts upon the ground that to follow the Virginia decision would be a denial of the right of plaintiff in error to such process. Assuming the contention to have been made, we are unable to see that any Federal question was thereby raised. Supposing the courts of West Virginia erred in giving conclusive effect to the Virginia decision, this was no more than an error of law, committed in the exercise of jurisdiction over the subject-matter and the parties; and such an error—not involving a Federal question—affords no opportunity for a review in this court.

The same response must be made to the second argument presented under the first assignment of error, which is that the contract in controversy shows that its terms, so far as they related to the property within the jurisdiction of West Virginia, were different from those which related to the property in Virginia, and that the West Virginia court, in holding them to be the same and refusing

to recognize the contract as a West Virginia contract deprived plaintiff in error of his property without due process of law.

It is not contended that the West Virginia court, in holding the Virginia judgment to be conclusive upon the present controversy, violated the "full faith and credit" clause of the Federal Constitution. By that clause, and by the act of Congress (§ 905, Rev. Stat.) passed to carry it into effect, it was incumbent upon the West Virginia court to give to the judgment the same faith and credit that it had by law or usage in the courts of Virginia. The effect of this was that, provided the Virginia court had jurisdiction of the subject-matter and of the parties (which was not questioned), the merits of the controversy there concluded were not open to reinvestigation in the courts of West Virginia. It is not here questioned that the West Virginia courts gave such credit to the Virginia judgment as was thus required.

Under the second assignment of error, the argument is that plaintiff in error was denied due process in the Virginia courts in that the Circuit Court of Rockingham County arbitrarily and unlawfully rejected his third amended bill, and its action in so doing was affirmed by the court of last resort of that State. Upon this point the West Virginia court (71 W. Va. 170), said:

"The said amendment was offered at a very late stage of the proceedings. The court based its rejection thereof upon two grounds, the delay in tendering it without excuse or explanation and its failure to show a contract materially different from that set up in the original and first and second amended bills. In disposing of the amendment, the court said: 'The bill had been amended twice already, and after these amendments, and after a thorough argument of the case on its merits, the court announced its decision. A due regard for the orderly procedure of the court and the rights of the opposing party required

that some limit be set to the privilege of amendments. The amendments now presented are offered without explanation or excuse, and in the main are unsubstantial, and would not change the opinion of the court on the merits of the case.' Having said this, the court proceeded to analyze the amendments and show their lack of merit and insufficiency to bring about a different conclusion if they had been filed. The decision relied upon to sustain this contention is *Hovey* v. *Elliott*, 167 U. S. 409, asserting lack of due process in the entry of a decree for the plaintiff, after having stricken out the defendant's answer, because he was guilty of contempt in neglecting to pay into court a certain sum of money. This was a total denial of the right of defense, upon an insufficient ground. In that case, the action of the court was arbitrary and oppressive. Here, the plaintiff had been allowed a hearing. He had filed an original and two amended bills and had no doubt had opportunity to tender the third amended bill long before the submission of the cause. It is certainly competent for a court to say, within reasonable limits, what amounts to a compliance with its rules and the principles of law, respecting the order and limitations of proceedings in a case. Besides, in the opinion of the court, the proposed amendment would not have changed the character of the plaintiff's claim, nor relieved the contract of its infirmity. An erroneous decision in respect to either of these matters would not amount to a denial of due process of law. As to them, it is not a case in which the plaintiff has had no day in court."

For present purposes it is sufficient to say that there is nothing upon the face of the record to indicate that the refusal of the Virginia court to entertain complainant's third amended bill was arbitrary or unlawful, or otherwise inconsistent with the "due process of law" clause of the Fourteenth Amendment; that there is nothing to show that in the Virginia court complainant based his right to

file a third amended bill upon the Fourteenth Amendment; and that if he had in fact set up such a right in the Virginia court and it had been there denied, his proper mode of obtaining a review of the Federal question would have been by prosecuting a writ of error under § 709, Rev. Stat. (§ 237, Jud. Code) to review the judgment of the court of last resort of Virginia, and not by attacking the judgment collaterally upon that ground when it was invoked against him in the courts of West Virginia.

With respect to the third assignment of error, it is contended that the Supreme Court of Appeals of West Virginia refused to give full faith and credit to the objection interposed by plaintiff in error to the plea of *res adjudicata* based upon the decrees rendered in the Virginia case of *Roller* v. *Murray*, the objection being based upon the record in the case of *Chesapeake-Western Company* v. *Roller*, a subsequent decision in the Virginia courts, which, it is contended, overruled the decision in the first Virginia suit so far as it tended to debar plaintiff in error from suing upon a *quantum meruit*. It appears that the decision in the *Chesapeake-Western Company Case* was to dissolve an injunction that had been issued against the prosecution of the West Virginia suit. Its effect as *res adjudicata* was denied by the West Virginia court (71 W. Va. 172), upon the ground that it was not a final decree. It is now contended that subsequent to the decree dissolving the injunction a final decree was rendered in the same cause which in effect concluded the merits. We find nothing in the record, however, to show that any such contention was presented to the West Virginia courts.

Since we are unable to find that any substantial question of Federal right was raised by plaintiff in error in the courts of West Virginia and there decided against him, it follows that the writ of error must be

Dismissed.